TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1905.

No. [redacted] 12.

HENRY P. BOOTH, SURVIVING PARTNER OF THE FIRM OF JAMES E. WARD & COMPANY ET AL., PETITIONERS,

vs.

THE NORWEGIAN BARK "ELIZA LINES," HER CARGO AND FREIGHT, ET AL.

ON WRIT AND CROSS-WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI FILED MARCH 22, 1904.

WRIT OF CERTIORARI AND RETURN FILED MAY 9, 1904.

PETITION FOR CROSS-WRIT OF CERTIORARI FILED MAY 20, 1904.

PETITION FOR CROSS-WRIT OF CERTIORARI GRANTED OCTOBER 17, 1904.

(19,278.)

(19,278.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 213.

HENRY P. BOOTH, SURVIVING PARTNER OF THE FIRM OF JAMES E. WARD & COMPANY ET AL., PETITIONERS,

vs.

THE NORWEGIAN BARK "ELIZA LINES," HER CARGO AND FREIGHT, ET AL.

ON WRIT AND CROSS-WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1900.

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No. 368.

HENRY P. BOOTH, Appellant,

v.

CATHARINE T. BLACK, Administratrix, et al.

No. 369.

CATHARINE T. BLACK, Administratrix, Appellant,

v.

BRADFORD DARRACH et al.

No. 370.

BANQUE DE GÊNES, Appellant, *v.* BRADFORD DARRACH et al.

No. 371.

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(1) Records in Circuit Court before consolidation of cases.
(2) Opinion of Circuit Court, April 3, 1894.
(3) Commissioner's Report.
(4) Opinion of Circuit Court, April 20, 1900.

LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
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EDWARD S. DODGE,
for CATHARINE T. BLACK, ADM'X, *and* BANQUE DE GÊNES.
JOHN LOWELL,
JAMES A. LOWELL,
for HANS ANDREASEN.

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.
1901.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1900.

THE ELIZA LINES, HER CARGO AND FREIGHT.

No. 368.

HENRY P. BOOTH, Appellant,

v.

CATHARINE T. BLACK, Administratrix, et al.

No. 369.

CATHARINE T. BLACK, Administratrix, Appellant,

v.

BRADFORD DARRACH et al.

No. 370.

BANQUE DE GÊNES, Appellant, *v.* BRADFORD DARRACH et al.

No. 371.

HANS ANDREASEN, Appellant, *v.* BRADFORD DARRACH et al.

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(3) Commissioner's Report.
(4) Opinion of Circuit Court, April 20, 1900.

LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
for HENRY P. BOOTH *and* BRADFORD DARRACH ET AL.
EDWARD S. DODGE,
for CATHARINE T. BLACK, ADM'X, *and* BANQUE DE GÊNES.
JOHN LOWELL,
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for HANS ANDREASEN.

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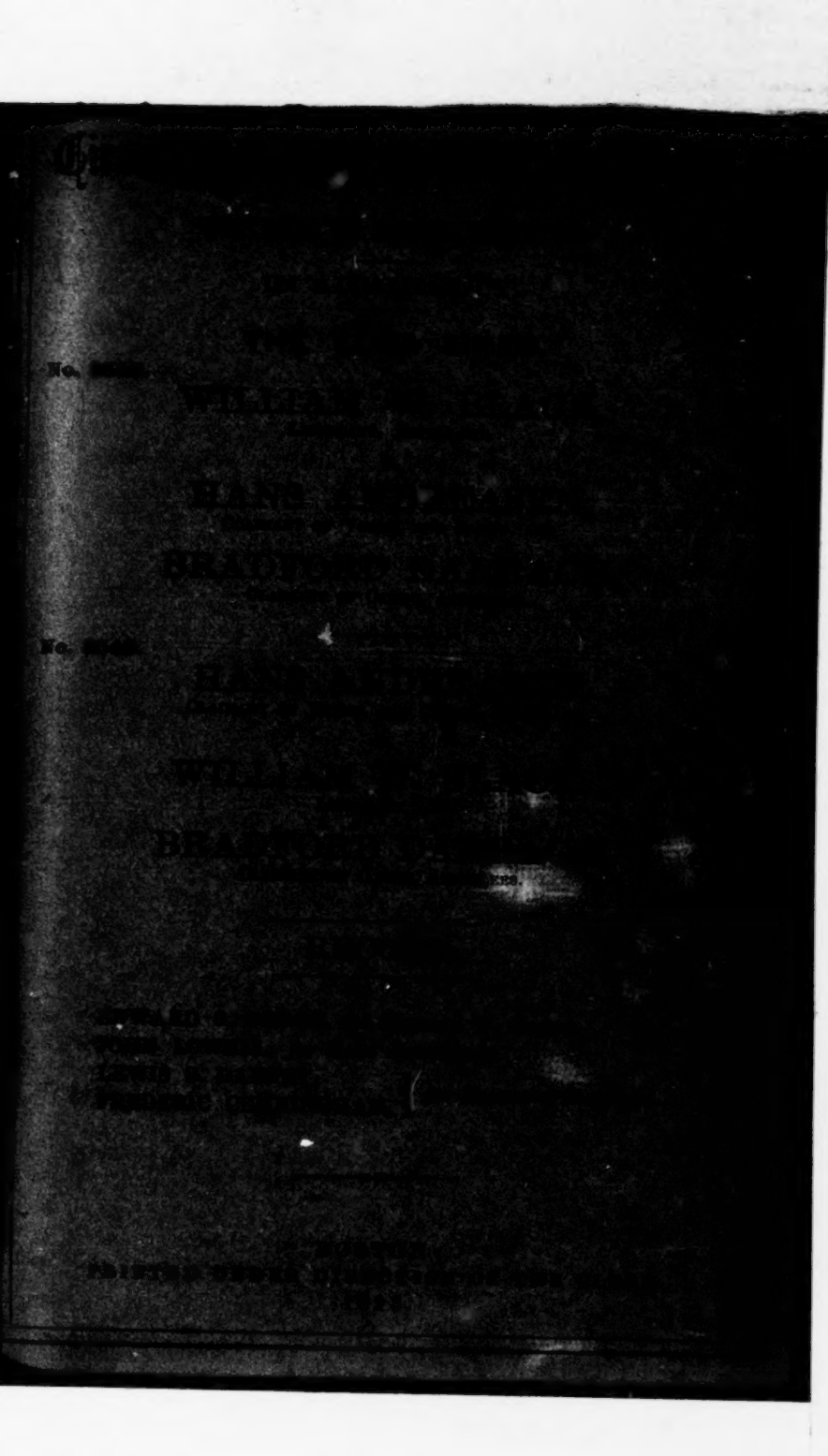

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

THE ELIZA LINES.

No. 3545.

WILLIAM W. BLACK,
LIBELLANT, APPELLANT,

v.

HANS ANDREASEN,
CLAIMANT OF VESSEL AND CARGO, AND

BRADFORD DARRACH,
CLAIMANT OF CARGO, APPELLEES.

No. 3546.

HANS ANDREASEN,
CLAIMANT OF VESSEL AND CARGO, APPELLANT,

v.

WILLIAM W. BLACK,
LIBELLANT, AND

BRADFORD DARRACH,
CLAIMANT OF CARGO, APPELLEES.

RECORD.

EDWARD S. DODGE, *for* WILLIAM W. BLACK.
JOHN LOWELL, *for* HANS ANDREASEN.
LEWIS S. DABNEY,
FREDERIC CUNNINGHAM, } *for* BRADFORD DARRACH.

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DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

THE ELIZA LINES.

WILLIAM W. BLACK, LIBELLANT,

v.

THE ELIZA LINES, CARGO AND PENDING FREIGHT MONEY;

HANS ANDREASEN, *Claimant of Vessel and Cargo;*

BRADFORD DARRACH ET AL., *Claimants of Cargo.*

TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

At the District Court of the United States, begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday (being the seventeenth day) of March, in the year of our Lord one thousand eight hundred and ninety-one.

Before

THE HONORABLE THOMAS L. NELSON, *Judge.*

WILLIAM W. BLACK, *Libellant,*

v.

THE ELIZA LINES, HER CARGO AND FREIGHT.

This libel was filed in the clerk's office, on the twenty-sixth day of September, A. D. 1889, and is as follows, viz:

LIBEL.

To the Honorable THOMAS L. NELSON, *Judge of the District Court of the United States, within and for the District of Massachusetts*:

William W. Black, of Brooklyn, in the Eastern District of New York, master and managing part owner of the schooner Edward E. Barrett, of said New York, on behalf of himself, and the other part owners of said schooner, exhibits this his libel and complaint against the Norwegian bark Eliza Lines, now lying in the port of Boston, in this district, her boats, sails, tackle, apparel and furniture, and also against the cargo of hard-pine lumber, now laden on board said bark, and against the freight money pending for the carriage thereof, in a cause of salvage, civil and maritime. And thereupon said libellant alleges and articulately propounds as follows:

First. That at the time of the events hereinafter set forth, said libellant, together with Charles E. Hughes, John Lewellyn, and Richard Behrens, all of said Brooklyn, Marcus A. Carr of Staten Island, and Martin Connors of the city of New York, were the sole owners of said schooner Edward E. Barrett, and said persons are still the sole owners of her. Said schooner is a vessel of about sixty-five tons' burden, and is employed in the pilot service of the port of New York, by the way of Sandy Hook, and her owners aforesaid are all pilots who pursue their occupation in said schooner. She was, at the time of the events hereinafter stated, tight, staunch, strong, well manned and completely equipped for the said service in which she was employed, and had on board a crew of eight persons, all told, consisting of the aforesaid pilots Hughes and Connors, one boatkeeper, one steward and four seamen, and was of the value of about eighteen thousand dollars ($18,000). The said libellant Black is master of her.

Second. That on Monday, Sept. 9, 1889, said schooner Edward E. Barrett left the port of New York, having on board all of the pilots above named, excepting said John Lewellyn, and bound on a cruise to sea, looking for steamers and other vessels bound in for the said port of New York. That on Monday, Sept. 16, while still upon said cruise, and in longitude 68° 40′ west, latitude 40° 55′ north,

said schooner fell in with the said bark Eliza Lines. said time the wind was strong from south-southwest, and the sea was rough. The said bark had lost her fore and main mast with all the spars and rigging thereto attached, and had also lost her mizzen-top-mast, her hatches were all open, excepting two; a portion of her deck load of lumber had been washed overboard, there was twelve feet of water in her hold, her pumps were choked, and she had been absolutely abandoned by her master, officers and crew. The place where said derelict bark was discovered by said schooner is upon the western end of the Georges Bank and about eighty miles to the eastward of the South Shoal, or Nantucket, Light Ship, and is directly in the track of ocean steamships passing each way between European and North American ports; and said bark was in great danger from other vessels as well as a source of great danger to them. When discovered, said bark was drifting in a northerly direction, was wholly incapable of being navigated without assistance from some other vessel, and was in great danger of going ashore, or of being broken up by the sea, and thus being totally destroyed together with her said cargo, if not speedily rescued.

Third. That said bark Eliza Lines, had, as said libellant is informed and believes, sailed from Pensacola on or about Aug. 13, 1889, with a cargo of hard-pine lumber, above referred to on board, for Montevideo, in the province of Uruguay, South America; that thereafter said bark became injured and damaged to such an extent that her master, officers and crew abandoned her on or about Sept. 11, 1889; and from the time of her abandonment, she continued to drift in the Atlantic Ocean with no one on board, at the mercy of the wind and waves, until discovered by said schooner.

Fourth. That upon discovering said bark, the said Charles E. Hughes, with a boatkeeper and one seaman, boarded her, and endeavored to pass a hawser from said bark to said schooner, in order to tow her, but were unable to pass said hawser, on account of the strong wind and sea. Said Hughes and said boatkeeper and seamen placed a bright light in the mizzen rigging of said bark, and returned to said schooner for the night, and said schooner lay by said bark during the night. On the morning of the next day, viz., Tuesday, Sept. 17, 1889, at five o'clock, the persons on board said

schooner made fast a hawser from said bark to said schooner, putting two men on board said bark to steer her and otherwise take charge of her, and began to tow said bark to the westward, and so continued to tow her until twelve o'clock noon on said Tuesday, Sept. 17, when, the wind having hauled to the westward, the course of said schooner was changed to the northward, and she thereupon proceeded with the intention of taking said bark to Boston. That at about ten o'clock, on the morning of Wednesday, Sept. 18, said schooner, with said bark in tow, met the towboat Underwriter, and thereupon the pilots in charge of said schooner made a contract with said towboat, that said towboat should tow said bark to Boston, for the sum of four hundred dollars ($400). Thereupon the hawser of said schooner, by means of which she was towing said bark, was transferred to said towboat Underwriter, said schooner was placed in tow astern of said bark, and the said towboat, bark and schooner proceeded toward Boston, where, with the assistance of another towboat, employed by said towboat Underwriter, said bark and schooner arrived at two o'clock on the morning of Thursday, Sept. 19.

Fifth. That said schooner was occupied in towing said bark before she met the towboat, Underwriter, as above set forth, about thirty hours, during which time she had towed said bark about fifty miles. In taking said bark in tow, and during the time that said schooner was towing said bark, the said schooner was exposed to great danger of being struck and injured by said bark, and a hawser belonging to said schooner was parted in said service. Said libellant has paid to said towboat Underwriter, four hundred dollars ($400) for the towage service performed by said towboat as aforesaid. In towing said bark and accompanying her to said Boston, the said owners of said schooner lost the profitable employment of her for a period of four days, and in laying by said bark in said port of Boston in endeavoring to effect a compromise of the claims of said libellant and the other part owners aforesaid of said schooner, against said bark, a further period of eight days has been lost, for which delay the libellant claims compensation at the rate of seventy-five dollars a day. Said libellant further has paid, or will be obliged to pay, wharfage for said bark

while lying in said port of Boston for eight days, at the rate of ten dollars per day, and five dollars per day for the services of watchmen to watch said property. In performing the services above set forth, the highest degree of skill and vigilance were necessary, and were used by the persons on board of said schooner, for the purpose of bringing said derelict bark and her cargo into Boston, as above set forth, and said libellant is entitled to and claims adequate salvage compensation therefor.

Sixth. That said bark Eliza Lines is, as libellant supposes, of the value of about $2,800; said cargo on board of her is of the value of about $4,500, and her pending freight of the value of $5,500, as nearly as libellant can now estimate the aforesaid values.

Seventh. That said bark and said cargo are now in the port of Boston, and within the admiralty and maritime jurisdiction of this Honorable Court.

Eighth. That all and singular the premises are true and within said jurisdiction.

Wherefore said libellant prays that process in due form of law may issue against the said bark, her boats, sails, tackle, apparel and furniture, and also against her said cargo, and against the freight money pending for the carriage thereof, in whosesoever hands the same may be found; that all persons having any interest therein may be summoned to appear and answer the premises, and that this Court will order said bark and said cargo to be sold and will award said libellant, from the proceeds thereof, a meet and competent salvage compensation for the salvage services above set forth, and order the same to be paid him with costs and expenses.

WILLIAM W. BLACK,
on behalf of himself and others,
part owners of Schooner EDWARD E. BARRETT.

EDWARD S. DODGE, *Proctor.*

COMMONWEALTH of MASSACHUSETTS,
SUFFOLK, ss.

BOSTON, September 26, 1889.

Personally appeared before me, the above named William W. Black, and signed the foregoing libel, and made oath before me, in

due form, that the statements of said libel by him subscribed are true to the best of his knowledge, information and belief.

[SEAL] ELISHA BASSETT,
Notary Public.

WARRANT AND MONITION.

Thereupon, on said twenty-sixth day of September, A. D. 1889, by order of the Judge, a warrant and monition issued, commanding the marshal to give notice to all persons concerned that the foregoing libel had been filed, and that trial would be had thereon at a District Court to be holden at the United States Court House in Boston, in said District of Massachusetts, on Friday, the fourth day of October next, at 10 o'clock A. M.; and to give said notice by advertising the same in the *Boston Daily Advertiser*, one of the public newspapers printed at said Boston, and by posting a copy of the same notice at the said Court House in Boston, seven days, at least, before said day of trial. And to take the said bark Eliza Lines and appurtenances and cargo into his custody; and further to serve this precept by reading the same, or giving a copy thereof, to the master or other officer in charge of said vessel, and if no such person was found by him, then to serve the same in the manner aforesaid upon some owner or agent of said vessel, if any be found within his precinct; and to make due return of his doings.

And the marshal made return as follows, viz:

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

BOSTON, Sept. 26, 1889.

Pursuant hereunto, I have given notice to all persons concerned, that the libel within named has been filed, and that trial will be had thereon on the fourth day of October next, by advertising the substance of the within monition in the *Boston Daily Advertiser*, one of the newspapers printed at Boston, in said District, and by posting up a copy of the same notice in the United States Court House in Boston, in said District, seven days before the day within named for trial. And on the twenty-sixth day of September, I took the within named Norwegian bark Eliza Lines and appurtenances and cargo into my custody, and put George O. Howard and Thomas Dolan in as keepers. On the twenty-sixth day of September, I served the within precept upon Hans Andreasen, as he is captain of said vessel, in Boston, in said District, and was on board and in charge at the time of service of said vessel and cargo, by giving to him in hand a true and attested copy of the within monition.

W. S. HOYT,
Deputy U. S. Marshal.

STIPULATION FOR COSTS AND EXPENSES, BY CLAIMANT OF VESSEL.

On the twenty-seventh day of September, A. D. 1889, at 9.38 A. M., before this court personally appeared Hans Andreasen of Farsund, in Norway, and produced for sureties Charles S. Gill and Gjert Lootz, both of Boston. And the said Andreasen, Gill and Lootz, submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors and administrators, jointly and severally, in the sum of two hundred dollars unto the said libellant, that the said Andreasen should pay all costs and expenses which should be awarded against him in this suit, upon the final adjudication thereof, or by any interlocutory order, whether it be in this, or any appellate court.

On said twenty-seventh day of September, A. D., 1889, at the time of filing the foregoing stipulation for costs and expenses, the following claim for vessel and cargo was filed in court, viz:

WILLIAM W. BLACK

v.

THE NORWEGIAN BARK ELIZA LINES,

the cargo of hard-pine lumber now laden on board said bark, and the freight money pending for the carriage of said cargo.

CLAIM.

And now comes Hans Andreasen, of Farsund, in the Kingdom of Norway, and, on oath, says that David Davidson, of said Farsund, is the managing owner of said bark, and that said Davidson, together with about ten other persons, whose names he is not now prepared to state, are the sole, true and *bona fide* owners of said bark, and that no other person or persons are the owners thereof; that he, said Andreasen, is the master of said bark, and was master of her at the time of her arrest by the marshal, and was in possession of her and her said cargo at said time; that he is the lawful bailee of said bark and said cargo for the owners thereof, and is the only person entitled to the possession of said bark, and to the possession of the said cargo of hard-pine lumber now laden on board of her, having given bills of lading for said cargo, and being obliged by the terms

of said bills of lading to deliver said cargo at Montevideo in the province of Uruguay, South America.

Wherefore he prays that said bark and said cargo of hard-pine lumber may be delivered to him upon his giving such stipulations, with sureties, and in such sums, as the Court shall direct.

HANS ANDREASEN.

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss. Sept. 27, 1889.

Sworn to by said Andreasen, before me,

[SEAL] ELISHA BASSETT,
Notary Public.

STIPULATION FOR COSTS AND EXPENSES, BY CLAIMANT OF CARGO.

On said twenty-seventh day of September, A. D. 1889, at 10.25 A. M., before this court personally appeared Bradford Darrach, of New York, in the District of New York, claimant of said cargo, and produced for sureties William S. Spaulding, of Boston, aforesaid, and G. Winthrop Coffin, of said Boston. And the said Darrach and Spaulding, submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors and administrators, jointly and severally, in the sum of two hundred dollars, unto the said libellant, that the said Darrach should pay all costs and expenses which should be awarded against him in this suit, upon the final adjudication thereof, or by any interlocutory order, whether it be in this, or any appellate court.

On said twenty-seventh day of September, A. D. 1889, at the time of filing the foregoing stipulation for costs and expenses, the following claim of Bradford Darrach for cargo was filed in court, viz:

CLAIM OF BRADFORD DARRACH FOR CARGO.

And now comes Bradford Darrach of New York in the State of New York, and claims the cargo of pitch-pine lumber, laden on board said bark, and says that James E. Ward, Henry P. Booth and William H. T. Hughes, merchants, doing business in said New York, as copartners, under the firm name and style of James E. Ward & Company, are true and *bona fide* owners of said cargo, and that no other person or persons are the owner or owners thereof,

and that he, the said Darrach, is duly authorized by said owners to make the claim in their behalf, and whereas said cargo was totally abandoned at sea by the master and crew of said bark, and the contract of carriage and lien for freight thereby abandoned, broken and waived, the said Darrach in behalf of said owners of cargo prays that this Honorable Court will order the said cargo to be delivered to him, upon his giving such stipulations therefor, as the Court may order, without the payment of any freight.

BRADFORD DARRACH.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. Sept. 27, 1889.

Sworn to by said Darrach, before me,

ELISHA BASSETT,

[SEAL] *Notary Public.*

On the fifth day of October, A. D. 1889, the following agreement as to value of bark Eliza Lines was filed in court, viz:

AGREEMENT AS TO VALUE OF THE BARK ELIZA LINES.

It is hereby agreed in the case above named that the said bark Eliza Lines, her boats, sails, tackle, apparel and furniture, is of the value of two thousand eight hundred dollars ($2,800).

EDWARD S. DODGE, *Proctor for Libellant.*
H. ANDREASEN, *Master.*
GILL & LOOTZ, *Agents.*

STIPULATION TO THE ACTION, FOR VESSEL.

On the fifth day of October, A. D. 1889, before this court personally
said
bot'
D

WARRANT TO DELIVER.

Thereupon, on said fifth day of October, A. D. 1889, by order of the Judge, a warrant issued, directing the marshal to cause said bark and her appurtenances to be delivered to the claimant aforesaid, he having duly stipulated therefor.

On which the marshal made the following return, viz:

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss. BOSTON, Oct. 5, 1889.

Pursuant to the within precept, I have caused the within bark Eliza Lines and appurtenances to be delivered to the claimant within named, and have taken his receipt for the same as under.

W. S. HOYT,
Deputy U. S. Marshal.

October 5, 1889. Received from marshal in and for the District of Massachusetts, the within named bark Eliza Lines and her appurtenances, in the same state as when seized and detained by him.

H. ANDREASEN,
Master Bark Eliza Lines.

On the eighteenth day of October, A. D. 1889, the following motion of H. Andreasen, master of said bark, to bond said cargo etc., was filed in court, viz:

MOTION OF HANS ANDREASEN TO BOND CARGO.

To the Honorable THOMAS L. NELSON, *Judge of the District Court of the United States, within and for the District of Massachusetts:*

Hans Andreasen of Farsund, in the Kingdom of Norway, respectfully represents and petitions as follows:

That he is now, and was in the month of August last, master of the Norwegian bark Eliza Lines, of said Farsund, a vessel of the burden of 462 tons or thereabout.

That in said month of August, 1889, said bark was at Pensacola, Florida, and there took on board a cargo of hard-pine lumber, for which cargo, your petitioner, as master of said bark, signed and

delivered bills of lading, wherein and whereby he acknowledged the lading of said cargo on board of said bark, and agreed and contracted to carry said cargo to Montevideo, in the province of Uruguay, South America, and to deliver said cargo to Messrs. Thomas Drysdale & Co., or to their assigns, at said Montevideo, or Buenos Ayres, at whichever place he might, upon arrival at said Montevideo, be ordered to deliver it.

That, on the thirteenth day of said August, 1889, he set sail in said bark from said Pensacola, with said cargo on board said bark, bound for said Montevideo, and on Sept. 7, 1889, said bark encountered a storm and heavy sea, which continued and increased in violence throughout September eighth and ninth, causing the bark to labor heavily, to take in water, and to roll and list heavily to starboard.

That on Monday, Sept. 9, 1889, it became necessary, in order to prevent said bark from capsizing, to cut away her fore and main mast, which was accordingly done to save said bark and her cargo aforesaid from further loss, and said bark then at once righted.

That by reason of the loss of said masts and by reason of other damage which said bark had suffered from perils of the sea during the gale aforesaid, the petitioner together with the other officers and the crew of said bark were compelled to leave her, which they did, latitude 38° 37′, N., longitude 67° 24′ W., on Sept. 11, 1889, and were then and there taken on board another vessel and carried to Port Maitland, in the province of Nova Scotia.

That, as your petitioner is informed and believes, said bark was, on Monday, Sept. 16, found at sea by the officers and crew of the schooner Edward E. Barrett, and was by them brought into the port of Boston in this said District of Massachusetts, on Thursday, Sept. 19, 1889.

That, upon the arrival of said bark and her said cargo at said Boston, your petitioner, master of said bark, accompanied by the other officers of said bark, came at once to said Boston, and there resumed possession of said bark and said cargo.

That on Sept. 26, 1889, the owners of said schooner Edward E. Barrett filed in this Honorable Court a libel for salvage against said bark Eliza Lines, her cargo of hard pine aforesaid and the

freight money pending for the carriage of said cargo; and said bark and cargo were thereupon taken into the custody of the marshal of the United States, for said District of Massachusetts, and the warrant and monition in said suit were served by said marshal upon your petitioner, who was, at the time of the service of said warrant and monition, and of the taking of the said bark and cargo into the custody of said marshal, on board of said bark, and in charge of her and her said cargo.

That thereupon, on Sept. 27, 1889, your petitioner appeared in this Honorable Court, and filed a claim for said vessel and cargo, and filed also a stipulation for costs and expenses in said suit, and was then and there ready and willing, and offered to file, also, a stipulation to release both said bark and her said cargo from the custody of said marshal, and was ready and willing to discharge and settle the claim of said salvors upon said bark and cargo.

That subsequently, upon said Sept. 27, 1889, Bradford Darrach, of the city and State of New York, also appeared in this court, and filed a claim also for said cargo, and also filed a stipulation for costs and expenses in said suit.

That your petitioner has filed a stipulation for the value of said bark, has released her from the custody of the said marshal, has partly repaired her, and is about to complete said repairs, and to resume his said voyage to Montevideo, in said bark.

That your petitioner has a lien upon said cargo, for the carriage thereof, and is entitled, by law, to carry on said cargo, and to earn freight thereon; and is ready and willing to discharge all claims for salvage against said cargo, and to carry said cargo to its destination, and demands the right to do so, without interference from any person or persons.

And your petitioner has, further, a lien against said cargo for general average contribution, for losses, expenses and charges incurred hitherto for its benefit.

Wherefore your petitioner prays that this Honorable Court will order the said cargo to be delivered to him, upon his giving such stipulation therefor as the Court may direct.

JOHN LOWELL,

18 October, 1889. *Proctor.*

On the eighteenth day of October, A. D. 1889, the following motion for sale was filed in court, viz:

MOTION FOR AN INTERLOCUTORY SALE.

And now comes Bradford Darrach, claimant of the cargo in the above entitled case, in behalf of James E. Ward, Henry P. Booth and William H. T. Hughes, merchants and copartners doing business in New York, under the firm name and style of James E. Ward & Company, and says that the value of said cargo is being rapidly diminished by reason of the charges of custody, and other costs and expenses, and moves for an interlocutory sale of said cargo, under the order of this Honorable Court.

By his Proctor,

FREDERIC CUNNINGHAM.

Thereupon, on the sixteenth day of November, A. D. 1889, the petition of Hans Andreasen to bond the cargo was denied, and it was ordered by the Court that the said cargo of bark Eliza Lines be sold at public auction.

WARRANT FOR SALE.

And on the nineteenth day of said November, in pursuance of the foregoing order, a warrant issued, commanding the marshal to sell the said lumber to the highest bidder, at public auction, at Boston, within said district, on Friday, the twenty-ninth day of November current, at twelve o'clock noon, first giving seven days' notice, at least, of the time and place of sale, by advertising the same in the *Boston Daily Advertiser*, one of the newspapers printed at Boston, and by proclamation of the town crier in the usual form on the day of sale; the money arising from the sale to be paid into the registry of the said court, to be disposed of as the law in this case directs; and to make due return of his doings.

And the marshal made return as follows, viz:

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS. BOSTON, Nov. 29, 1889.

Pursuant to this precept, I have caused the cargo of the bark Eliza Lines as within named to be sold by public auction and to the highest bidder, at South Boston, on the day, hour and place therein directed, having given seven days' previous notice of the time, place and manner of the sale in the *Boston Daily Advertiser*, a newspaper printed in Boston, Mass., and by the town crier, on the day of sale, and at such sale the purchasers were as under:

Sold cargo to George McQuesten & Co., for		$1,825 00
Expenses of Sale.		
Service and attendance,	$7 00	
Copies,	2 00	
Travel,	30	
Ads. Posting & Expense,	45 75	
Bill of Sale,	5 00	
Custody,	27 50	
Commissions,	29 06	
	$116 61	
Bills paid by marshal for discharging and storage of cargo and for pumping vessel as ordered by the Court, Dec. 18, '89,	791 65	914 26
		910 74

Whereby the net sales amounted to nine hundred and ten dollars and seventy-four cents, which I pay over to Elisha Bassett, the clerk of the court aforesaid, to be disposed of as the Court directs.

Attest: H. B. LOVERING, *Marshal.*

Received from Henry B. Lovering, Marshal, nine hundred and ten dollars seventy-four cents, being (as he saith) the proceeds of the foregoing sale; the moneys to be disposed of as the Court directs.

ELISHA BASSETT, *Clerk.*

BOSTON, Dec. 23, 1889.

On the twenty-sixth day of November, A. D. 1889, the following amendment of claim of Bradford Darrach for cargo was filed in court, viz:

AMENDMENT OF CLAIM OF BRADFORD DARRACH FOR CARGO.

And now comes Bradford Darrach, and says that the Atlantic Mutual Insurance Company of New York, having its usual place of business in the city of New York, did insure James E. Ward & Company, on whose behalf, and by whose authority he claimed the cargo of the said bark Eliza Lines in this cause, against loss of said cargo, by perils of the seas and other perils, on a voyage from Pensacola to Montevideo, being the voyage mentioned in the libel in this cause, in the sum of forty-five hundred dollars, that said Ward & Company abandoned said cargo to said Insurance Company and since the filing of said claim, to wit, since the eighteenth day of October, A. D. 1889, the said Insurance Company has accepted said abandonment, and has paid said Ward & Company for a total loss of said cargo and has received from said Ward & Company an assignment of said cargo, and of all said Ward & Company's claims to the same.

Wherefore he prays that his said claim may be amended by substituting the said Atlantic Mutual Insurance Company for said James E. Ward & Company as the claimant on whose behalf he claims the said cargo, and that his said claim may stand as the claim of said Atlantic Mutual Insurance Company.

BRADFORD DARRACH,
by LEWIS S. DABNEY,
his Proctor.

SUFFOLK, ss.

Personally appeared before me Lewis S. Dabney, and makes oath that he is authorized by said Bradford Darrach to make, file and ask the allowance of the foregoing amendment, and that he is informed and believes that the statements therein contained are true.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, this twenty-sixth day of November, in the year of our Lord eighteen hundred and eighty-nine.

[SEAL] EDWIN N. HILL,
Notary Public.

On the twenty-seventh day of November, A. D. 1889, the following petition that the freight money be paid into court was filed in court, viz:

PETITION THAT FREIGHT MONEY BE PAID INTO COURT.

William W. Black, of Brooklyn, in the Eastern District of New York, master and managing part owner of the schooner Edward E. Barrett, libellant in the above entitled action, respectfully represents as follows:

That on Sept. 26, 1889, he filed the libel in the suit above named, against the said bark Eliza Lines, her boats, sails, tackle, apparel and furniture, and also against the cargo of hard-pine lumber then laden on board said bark, and against the freight money pending for the carriage thereof, in whosesoever hands the same might be found.

That, upon due service of said libel, there appeared in this Honorable Court on Sept. 27, 1889, two adverse claimants to the cargo of lumber aforesaid, viz: Hans Andreasen, master of said bark Eliza Lines, claiming a lien upon said cargo for the carriage thereof, and also for certain general average expenses incurred for the benefit of said cargo, and desiring to carry said cargo to its destination at Montevideo, in the province of Uruguay, South America; and also Bradford Darrach of New York, in the State of New York, claiming said cargo in behalf of James E. Ward, Henry P. Booth and William H. T. Hughes, copartners, doing business in said New York under the firm name and style of James E. Ward & Co., owners of said cargo, who prayed that this Honorable Court would order said cargo to be delivered to him, said Darrach, in behalf of said owners, and that this Honorable Court would order said cargo to be sold.

And subsequently, viz., on Oct. 18, 1889, said James E. Ward, Henry P. Booth and William H. T. Hughes, copartners as aforesaid, filed in this Honorable Court a libel against said cargo for the possession thereof.

That, upon hearing had upon the aforesaid claims and libel for possession, and due deliberation thereon, this Honorable Court did, on November 16, 1889, order, adjudge and decree that said James E

Ward and others, owners of said cargo, were entitled to the possession of said cargo, and did order said cargo sold by the marshal. That upon the termination of the carriage of said cargo in said bark Eliza Lines, by the decree and order aforesaid of this Honorable Court, the aforesaid claimant, Darrach, and owners of said cargo became and are bound to pay to the master and owners of said bark freight money for the carriage of said cargo, which freight money, as your petitioner is informed and believes, amounts to the sum of $5,600, and said Black, libellant, your petitioner, is entitled to a meet and competent salvage compensation to be awarded to him, out of said freight money.

Wherefore this petitioner prays that this Honorable Court will order and require the said Bradford Darrach, and the said James E. Ward, Henry P. Booth and William H. T. Hughes, claimant and owners of said cargo as aforesaid, to appear and show cause why said freight money should not be brought into this court to answer the exigency of the suit above named of your petitioner Black; and if no sufficient cause is shown, that the Court will order the same to be brought into court as aforesaid to answer as aforesaid; and that this Honorable Court will grant to this petitioner further process, if necessary, upon his libel aforesaid, to enable him to avail himself of the freight money aforesaid, and will grant him such other and further relief as to law and justice may appertain.

WILLIAM W. BLACK,
by GJERT LOOTZ,
his Attorney.

EDWARD S. DODGE, *Proctor.*

SUMMONS TO SHOW CAUSE.

On the twenty-seventh day of November, A. D. 1889, by order of the Judge, a summons issued commanding the marshal to summon the said Bradford Darrach, of the city and State of New York, and James E. Ward, Henry P. Booth and William. H. T. Hughes, co-partners, doing business in said New York as James E. Ward & Co., to appear before the District Court of the United States to be holden at Boston within and for the Massachusetts District, on Friday, the sixth day of December next, at ten o'clock A. M., then and there to

show cause, if any they had, why they should not bring into court the freight money due for the carriage of the cargo of hard pine lmuber, lately laden on board the bark Eliza Lines, as prayed for in the foregoing petition. And it was ordered by the Court that service be made by serving this summons upon Lewis S. Dabney and Frederic Cunningham, Esquires, their proctors. And to make due return of his doings.

And the marshal made return as follows, viz:

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

BOSTON, Nov. 29, 1889.

Pursuant hereunto, I have this day summoned the within named Bradford Darrach, of New York, and James E. Ward, Henry P. Booth and William H. T. Hughes, copartners of New York, copartuers, under firm name of James E. Ward & Co., to appear before the District Court of the United States, as within directed, by giving to Lewis S. Dabney and Frederic Cunningham, proctors for abovenamed persons, each in hand at Boston, a true and attested copy of the within summons.

W. S. HOYT,
Deputy U. S. Marshal.

And on the twenty-seventh day of said November the amendment of claim for cargo was allowed by the court.

This libel was entered at the September term of this court, A. D. 1889, and thence was continued to the December term thereof, A. D. 1889, when, on the ninth day of December, A. D. 1889, the following answer of Bradford Darrach and others to the petition filed November 27, 1889, of William W. Black, was filed in court, viz:

ANSWER OF BRADFORD DARRACH ET AL.

The Answer of Bradford Darrach, and of James E. Ward & Company, to the Petition of William W. Black, filed in this cause November 27, 1889.

And now come Bradford Darrach, of the city and State of New York, and also James E. Ward, Henry P. Booth, William H. T. Hughes, copartners, doing business in said New York under the style of James E. Ward & Company, and for answer to the said petition filed in this cause by William W. Black, praying that they be required to show cause why certain freight money, alleged to be

due, should not be brought into court to answer the exigency of this suit, respectfully show cause as follows:

1. As to the allegations of said petition, in respect to the filing of libels, claims, motions, hearings and orders of this Honorable Court, these respondents crave leave to refer to the records thereof in this court now remaining, and save in as far as said allegations are supported by said records, they deny the same and each of them.

2. And they deny that the termination of the carriage of said cargo in said bark Eliza Lines was by the decree and order of this Honorable Court, as in said petition alleged, and they deny that they or any of them became, or are, bound to pay to the master or owners of said bark the freight money in said petition alleged, or any freight money.

3. And said respondents for further answer say that said bark Eliza Lines, in the month of August now last passed, sailed from Pensacola, in the State of Florida, with said cargo of lumber on board bound on a voyage to Montevideo, and in the month of September following, the master and crew of said bark abandoned her at sea, with her cargo, and left said bark and cargo derelict on the Atlantic Ocean, without expectation or intention of said master and crew to retake possession of the same, and by so doing the said master abandoned the performance of the contract of affreightment and carriage of said cargo, and the owners of said cargo became entitled to treat said contract as at an end; that said bark and part of her cargo, having been found derelict and abandoned on the Atlantic Ocean, was salved and brought to Boston by salvors, who thereupon filed in this Honorable Court their libel against said bark and cargo for salvage; that due process issued out of this Honorable Court against said bark and cargo upon said libel, and was served by the marshal of the United States, who took said bark and cargo into his possession, and the said cargo remained in the possession of said marshal, and was not delivered by him to anyone until the same was sold by said marshal, under the order of this Honorable Court; that the whole of said cargo that was saved was sold by the said marshal as aforesaid, and the whole proceeds of said sale have been, or will be, paid to said marshal, and have been, or will be, by said marshal, paid into the registry of this Honorable Court; that the

said salvors are to be paid out of said proceeds a suitable salvage, and that these respondents are informed that the owners of said bark claim to have a lien on said cargo and on said proceeds for certain general average charges, of the amount of which these respondents have not been informed.

4. And these respondents say that if the owners of said cargo, or their assignees, are bound to pay any freight for the carriage of said cargo, which they deny, the freight which said owners or assignees are bound to pay is the fair value of the benefit conferred upon so much, if any, of said cargo, as may be left after the claims of said salvors and for general average shall have been satisfied out of it, by the carriage of said remaining portions, if any, to the point on the Atlantic Ocean, where said bark and cargo were by said master abandoned and left derelict as aforesaid; that the fair value of such benefit cannot in any event exceed the amount of the proceeds of such remaining portions, if any, of said cargo, and said proceeds are or will be in the registry of this Honorable Court subject to its order for the payment of such freight, and that there is no liability for the payment of any freight beyond or in addition to the proceeds of sale of the whole cargo saved which are in the possession and control of this Honorable Court.

5. And said Darrach for further answer says that personally he has no interest in said cargo, and has acted in these proceedings only as agent for others, as appears by the records, and therefore he ought not personally to be required to pay any money into court.

6. And said James E. Ward & Company for further answer say that before said bark Eliza Lines sailed from Pensacola upon said voyage, they caused said cargo to be insured in the sum of forty-five hundred and sixty dollars, against loss by perils of the seas and other perils, by the Atlantic Mutual Insurance Company of the city of New York; that on the nineteenth day of September, 1889, they abandoned said cargo to said insurers, who accepted said abandonment, and on the twenty-sixth day of November, A. D. 1889, paid said James E. Ward & Company, in full for a total loss of said cargo, whereby said insurance company became from the time of the loss of said cargo, to wit, from the time of its abandonment on the Atlantic Ocean by said master as aforesaid, the owner

of said cargo, and the said James E. Ward & Company, from the same time, ceased to be the owners of said cargo, or to have any interest in the same, and therefore the said Ward & Company ought not to be required to pay any money into court.

Wherefore they pray that said petition be dismissed.

BRADFORD DARRACH,
JAMES E. WARD,
HENRY P. BOOTH,
WILLIAM H. T. HUGHES,
by LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
Proctors.

Answer of owners of the vessel filed in court, viz:

ANSWER OF HANS ANDREASEN, CLAIMANT, ETC.

Answer of Hans Andreasen, claimant of the bark Eliza Lines, to the libel of William W. Black and others, master and owners of the schooner Edward E. Barrett, for salvage. Said answer being made in behalf of all the owners of said vessel.

First. This respondent and the other owners of said bark are ignorant of the matters and things alleged in the first article of the libel, and leave the libellants to their proof thereof.

Second. They make the same answer to the second article of said libel.

Third. They admit the truth of the matters alleged in the third article.

Fourth and Fifth. To the fourth and fifth articles they make the same answer as they make to the first and second.

Sixth. They say that the true value of said bark is about $2,250, instead of $2,800, as alleged by the libellants; the value of the freight they submit to the court, under the circumstances of the case. The value of the cargo they do not know, and leave it to the proof to be adduced by the libellants.

Seventh and Eighth. They admit that the bark was in Boston when the libel was filed, and that this court has jurisdiction of the cause.

Ninth. They admit that salvage is due to the master, crew and owners of the schooner Edward E. Barrett, and respectfully submit the amount thereof to the court.

JOHN LOWELL,
Proctor.

On the eighteenth day of December, A. D. 1889, the following order to the marshal, to pay certain charges and expenses out of proceeds of cargo, was filed in court, viz:

ORDER OF COURT TO PAY CERTAIN EXPENSES, ETC.

Whereas the following expenses and charges have been incurred for the discharge of the cargo of the bark Eliza Lines, and for the care and preservation of said cargo, prior to the date of the issuing of the warrant for the sale of said cargo (Nov. 19, 1889), viz:

Look and Quinn, stevedores for discharging cargo,	$693 50
Look and Quinn, stevedores (paid), for pumping,	34 40
New York & New England R. R. Co., wharfage,	145 00
New York & New England R. R. Co., storage,	178 19
	$1,051 09

Now, therefore, upon hearing had of the several parties in interest in the matter, it is ordered by the Court that the expense aforesaid of discharging said cargo be apportioned, one fourth upon the bark Eliza Lines, and three fourths upon said cargo; that the expense aforesaid of pumping and storage be borne exclusively by said cargo; and that the expense aforesaid of wharfage be apportioned between said bark and said cargo, in proportion to their respective valuations, at the following sums, viz: Bark Eliza Lines, $2,250; cargo, $1,825; all as appears in the following table, viz:

	Bark Eliza Lines.	Cargo.
Discharging,	$173 38	$520 12
Pumping,		34 40
Wharfage,	80 06	64 94
Storage,		178 19
	$253 44	$797 65

And it is further ordered by the Court that said sum of $797.65, being the portion of the aforesaid charges and expenses to be borne by said cargo, shall be paid by the marshal out of the proceeds, now in his possession, arising from the sale of said cargo.

From said December term, A. D. 1889, this libel was continued from term to term to the December term thereof, A. D. 1890, when, on the sixteenth day of January, A. D. 1891, the following motion for stipulations was filed, by leave of Court, as of Nov. 27, A. D. 1889, viz:

MOTION.

And now comes William W. Black, the libellant in the case above named, and petitioner in said case, that the court will order the freight money, in the hands of Darrach, and of James E. Ward and others, to be paid into court, and prays this Honorable Court to order the said Darrach, or said James E. Ward and others, to file a stipulation, with sufficient sureties, in this court, to answer his petition, and to pay into the registry of this court said freight money for the carriage of said cargo, or such portion of said freight money as the Court may order; and he further prays that, until such stipulation is given, this Court will rescind and restrain the order and warrant for the sale of said cargo, heretofore made and issued, upon the motion of said Darrach, or said James E. Ward *et al.*, and that if no such stipulation is given, that the Court will order said sale abandoned.

By his Proctor,

EDWARD S. DODGE.

And on the same sixteenth day of January, A. D. 1891, the foregoing motion is disallowed by the Court, as of Nov. 27, 1889.

EVIDENCE FOR LIBELLANT.

The deposition of Hans Andreasen, taken at the office of the Hon. John Lowell, Counsellor at Law, at 3 Pemberton square, Boston, before Walter Rogers, Esq., a Notary Public, duly authorized, on Saturday, Jan. 4, 1890, at 10.15 A. M.

U. S. DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

WILLIAM W. BLACK

v.

BARK ELIZA LINES, HER CARGO AND FREIGHT.

JAMES E. WARD ET AL. *v.* CARGO OF BARK ELIZA LINES.

HANS ANDREASEN *v.* 295,000 FEET OF LUMBER ET AL.

DEPOSITION OF HANS ANDREASEN.

This deposition is taken in the above entitled cases, in pursuance of the notices, of which copies are hereto annexed.

Mr. Frederic Cunningham appears for the Atlantic Mutual Insurance Company, and for no one else.

In the first entitled suit Edward S. Dodge appears for the libellant, and John Lowell for Hans Andreasen, claimant of the bark Eliza Lines and cargo. In the second case, John Lowell and Edward S. Dodge appear for Hans Andreasen, claimant of said cargo, and respondent. And in the third case John Lowell and Edward S. Dodge for the libellant.

G. LOOTZ, sworn as interpreter.

HANS ANDREASEN, being first duly sworn, deposes and says as follows:

Direct Examination by Mr. DODGE.

Q. 1. What is your name? *A.* Hans Andreasen.

Q. 2. Where do you live? *A.* I belong to Farsund, Norway.

Q. 3. Of what vessel are you master? *A.* The Eliza Lines.

Q. 4. How long have you been master of the Eliza Lines? *A.* About twenty months.

Q. 5. How long have you been going to sea? *A.* About eight years.

Q. 6. About how long have you been master? *A.* About four years.

Q. 7. Where was the bark Eliza Lines in July last? *A.* I arrived at Pensacola the first day of July, and remained at Pensacola during July.

Q. 8. For what purpose did you go there? *A.* I had made a charter under which I had to go to Pensacola to load lumber.

Q. 9. For what port? *A.* Montevideo for orders.

Q. 10. Is that the charter party? [*Paper marked for identification* "*W. R.*"] *A.* Yes.

Q. 11. Did you take on a cargo of hard-pine lumber at Pensacola? *A.* Yes.

Q. 12. About how much cargo did you take on board? *A.* Two hundred and ninety-four thousand feet.

Q. 13. Did you give bills of lading for that cargo? *A.* Yes.

Q. 14. Is that a copy of the bill of lading? [*Paper marked for identification* "*W. R.*"] *A.* Yes.

Q. 15. Is that the captain's copy? *A.* Yes.

Q. 16. I notice this copy is not signed by you. Did you sign the other copies of the bill of lading? *A.* I did.

Q. 17. What day did you sail from Pensacola? *A.* August 13.

Q. 18. Did you, on that voyage, meet with any disaster? *A.* Yes.

Q. 19. When? *A.* September, the ninth. The gale commenced on the seventh of September.

Q. 20. What damage, if any, did the vessel suffer in that gale? *A.* She became leaky, she lost her bulwarks, and she became unmanageable, so that I had to cut away the masts to save her.

Q. 21. What day did the gale begin? *A.* The gale commenced on the seventh.

Q. 22. And how long did it continue? *A.* On the ninth it was most severe, and I had to cut the masts overboard.

Q. 23. Why was it necessary to cut the masts away? *A.* In order to try to save both the ship, the cargo and the crew.

Q. 24. Was the vessel at the time you cut the masts away listed at all? *A.* Yes.

Q. 25. What would have happened if you hadn't cut the masts away? *A.* As far as I can judge, the ship would have capsized unless I had cut the masts.

Q. 26. Before you cut the masts away did you consult with your officers as to the propriety of cutting them away? *A.* I consulted with my whole crew.

Q. 27. After you cut the masts away did you save the spars and rigging attached? *A.* All was lost,—there was nothing saved.

Q. 28. After you had cut the masts away, what, if anything, happened to your vessel? Did she right? *A.* She righted.

Q. 29. Upon what day were the masts cut away? *A.* September 9.

Q. 30. How long after that did you and your crew remain on board the bark? *A.* Two days.

Q. 31. What did you then do? *A.* We sighted a sailing vessel, and made signals of distress to her, and she came alongside, and I asked them to take us aboard, and she did so.

Q. 32. Why did you leave the Eliza Lines? *A.* For the reason that the ship was entirely broken,—she was leaking and had no rigging to help herself with.

Q. 33. Do you know in what latitude and longitude the Eliza Lines was when you left her? *A.* Latitude 38 degrees and 37 minutes north; longitude 67 degrees and 24 minutes west.

Q. 34. What was the name of the vessel which took you and your crew from the bark? *A.* The Edith Mary.

Q. 35. Where did she carry you and your crew? *A.* She landed us at a small place close to Yarmouth, Nova Scotia.

Q. 36. Was the name of that place Port Maitland? *A.* Yes.

Q. 37. At the time you left the Eliza Lines, was she leaking? *A.* Yes.

Q. 38. Were any of her masts standing, or parts of any of her masts? *A.* The mizzen-mast itself was standing, the mizzen-top-mast was gone.

Q. 39. Were the other masts gone? *A.* The other two masts were cut away.

Q. 40. Were her hatches on when you left her? *A.* As far as I know, the hatches were on.

Q. 41. Was her deck load all upon her deck? *A.* The deck load was, excepting what I had thrown overboard before I cut the masts overboard.

Q. 42. Had any of the deck load been washed overboard? *A.* I don't think so, but couldn't tell for certain.

Q. 43. When had you thrown over any of her deck load, and why did you do it? *A.* I tried a little while, in the forenoon of the ninth of September, to throw over a part of the deck load in order to right the ship.

Q. 44. How much had you thrown over that day? *A.* About three to four thousand feet.

Q. 45. Was this before or after you cut away the masts? *A.* Before.

Q. 46. How much water was in the hold of the Eliza Lines when you left her? *A.* I can't tell that exactly.

Q. 47. Were her pumps in working order? *A.* Yes.

Q. 48. When you reached Port Maitland, did you communicate with the owners of the bark Eliza Lines? *A.* The first thing I did when I landed at Port Maitland, was to get to Yarmouth as fast as I could, and there I communicated with the Swedish Consul, and telegraphed my owners.

Q. 49. Did you receive any instructions from your owners after you had telegraphed them? *A.* At Yarmouth, I received no reply, or no communication, and then I proceeded to St. John, and at that place I received a cable from my owners, saying that the

Eliza Lines had been saved, and had been towed into Boston, and I should proceed to Boston.

Q. 50. Did you go to Boston, upon receiving that telegram? *A.* Yes, the same day.

Q. 51. Did any of your officers or crew come with you to Boston? *A.* The two mates, the first and second mate, and the steward.

Q. 52. What became of your crew? *A.* The crew were shipped in St. John on board of a Nova Scotia vessel to go home to Liverpool.

Q. 53. What day did you, with your mates, arrive in Boston? *A.* Sept. 21.

Q. 54. Do you remember what day of the week that was? *A.* Saturday.

Q. 55. Did you visit the Eliza Lines on that day? *A.* No, I came here, late in the evening.

Q. 56. Did you on the next day, Sunday, visit the Eliza Lines? *A.* Yes, I went on board then.

Q. 57. Did you go into her cabin? *A.* I wanted to go down, but I was refused admittance by a watchman.

Q. 58. What watchman was that? *A.* I think it was the watchman representing the salvors.

Q. 59. Did any of your mates go on board on Sunday? *A.* The first officer was there, but I don't think the other was.

Q. 60. When did you first go into your cabin of the Eliza Lines? *A.* I don't know for sure, but I think it was either Monday or Tuesday following.

Q. 61. Were you on board the vessel, when the marshal arrested the vessel and cargo at the suit of the salvors? *A.* I was on board at the time that paper, or summons, or warrant was handed me; I was on board when that paper was handed me.

Q. 62. Were any of your officers on board at the same time? *A.* I know the mate was there, I think the second mate also.

Q. 63. How frequently, between the time the marshal served this paper upon you and the time that you had arrived in Boston, had you or your officers visited the vessel? *A.* Every day.

Q. 64. Had you any property on board? *A.* I had my clothing, my instruments, and my charts.

Q. 65. Had the mates any property on board? *A.* Yes.

Q. 66. After the vessel had been arrested by the marshal, what was done with the cargo on board, — was it discharged, or kept on board the vessel? *A.* The cargo was discharged.

Q. 67. Whether, or not, you were ready and willing to repair your vessel, and carry that cargo on to Montevideo? *A.* Yes.

Q. 68. Whether or not that was your intention at the time that you came to Boston, with your mates? *A.* The moment *I* arrive I could not tell what my intentions were, but a short time afterwards, when I took in the situation, it was my intention.

Q. 69. For what purpose did you discharge the cargo? *A.* There had been some water in the ship for some time, and it was necessary in order to repair her to discharge part of the cargo.

Q. 70. Did you repair the vessel? *A.* Yes.

Q. 71. Is she now completely repaired and ready for sea? *A.* Yes, in brilliant condition.

Q. 72. Do you know what finally became of the cargo? *A.* The cargo was sold at auction in Boston.

Q. 73. Up to the time that the cargo was sold were you ready and willing to carry it on to Montevideo and complete your voyage? *A.* Yes.

Q. 74. Are you about to proceed to sea in the bark? *A.* Yes.

Q. 75. Upon what voyage? *A.* Either Lisbon or Cadiz.

Q. 76. When did you make the charter to go upon this voyage to Lisbon or Cadiz? *A.* The exact date I can't tell, but it was a long time, or some time, after the cargo was sold.

Q. 77. Have you ever received any freight for the carriage of the cargo which you took on at Pensacola? *A.* No.

Q. 78. How long is the voyage usually from Pensacola to Montevideo? *A.* About three months.

Q. 79. Have you ever made the voyage? *A.* I have made one voyage before.

Q. 80. Will you describe generally the course of that voyage? Can you sail directly from Pensacola to Montevideo? *A.* No.

Q. 81. Which way do you sail first? *A.* I first make my

course southeast until I reach the Florida Strait, and then the course goes northeast through the Florida Strait; when the wind becomes fair I steer southwest, and then I change my course more southerly towards south and southwest.

Q. 82. After the vessel and cargo had been arrested by the United States Marshal, did you give a bond to have the vessel released from the marshal's charge? *A.* Yes.

Q. 83. Were you ready and willing at that time, and did you offer to give a bond also, to release the cargo? *A.* Yes.

Q. 84. When do you expect to sail from Boston to Lisbon? *A.* As soon as I can be ready; probably the middle of next week.

Cross Examination by Mr. CUNNINGHAM.

×-*Q.* 85. When you left your vessel, Captain, in the latitude and longitude that you have named, you never expected to see her again, did you? *A.* I can't say that I expected to see her again.

×-*Q.* 86. Was it before or after you heard of her being saved that your crew went to Liverpool from St. John? *A.* The crew left Yarmouth two or three days before I did, for St. John. When I arrived in St. John, the crew were already shipped and ready to go to Liverpool.

×-*Q.* 87. When you heard that the Eliza Lines was saved, had the crew already sailed for Liverpool? *A.* No, they had not.

×-*Q.* 88. At that time had the crew shipped for Liverpool? *A.* Yes.

×-*Q.* 89. On what vessel? *A.* I don't know the name of the ship, but it was a Nova Scotia vessel; I think it belongs to Yarmouth.

×-*Q.* 90. As passengers, or as seamen? *A.* As crew.

×-*Q.* 91. When you first went on board the vessel at Boston, you say you found a watchman representing the pilots who were salvors. Did that watchman continue on board the vessel up to the time when the paper was given to you by the marshal? *A.* Yes.

×-*Q.* 92. The watchman was on board all the time, wasn't he, up to the time when the paper was given to you by the marshal? *A.* Yes.

×-*Q.* 93. You didn't sleep on board the vessel, and didn't consider yourself responsible for her safety? *A.* I didn't sleep on

board, because the cabin of the ship wasn't in condition for me to sleep.

×-*Q.* 94. And didn't consider yourself responsible for her safety? *A.* I don't understand that.

×-*Q.* 95. I will ask you this: When the watchman told you to leave the vessel the first time you went aboard, you did so, didn't you? *A.* After I was refused admittance to the cabin, I remained on deck a little while, and then went ashore.

×-*Q.* 96. If he had given you any other orders respecting the vessel, you would have followed them, wouldn't you? If he had told you to leave the vessel you would have gone, wouldn't you? *A.* If he had chased me ashore, I would have had to go.

×-*Q.* 97. And at that time you had your two mates with you, didn't you? *A.* The first time I came on board I was there alone.

×-*Q.* 98. And you paid her visits every succeeding day until the paper was handed you? *A.* Several times each day I visited the ship.

×-*Q.* 99. And lived ashore? *A.* And lived ashore.

×-*Q.* 100. Your chronometers and clothing you left aboard the vessel when you abandoned her? *A.* I abandoned my chronometer, and took a few articles in a bag, so that I would have a change of clothing.

×-*Q.* 101. But the chronometer and instruments and clothing of which you speak, as being on board the vessel when she was in Boston, those you left on board of her, when you abandoned her at sea? *A.* Yes.

×-*Q.* 102. You never assumed to remove anything from the vessel, other than your personal effects, or any control of her while the watchman or the marshal was aboard, did you? *A.* No.

Direct Examination resumed by Mr. DODGE.

Q. 103. After the first day after you returned to Boston, did this watchman make any objection to you or your mates coming on board? *A.* Not to enter the ship's deck, but he objected to our going into the cabin.

Q. 104. Did he object to your going into the cabin after the first day? *A.* Yes.

Q. 105. Did you go into the cabin, in spite of his objection? *A.* I didn't go until I got permission.

Q. 106. From the watchman? *A.* Yes.

Q. 107. When you gave bills of lading for your cargo at Pensacola, to whom did you undertake to deliver at Montevideo?

[*Objected to.*]

A. Thomas Drysdale & Co.

Q. 108. Did you ever undertake or promise to deliver to James E. Ward & Co. at Montevideo? *A.* No.

Q. 109. At the time you and your crew left the Eliza Lines, what was the condition of her supply of fresh water? *A.* We had no supply of fresh water, because, during the gale, the fresh water had got mixed with salt water, and was unfit for drink; we had no supply.

HANS ANDREASEN.

MAGISTRATE'S CERTIFICATE.

I, Walter Rogers, a Notary Public within and for the County of Suffolk, and Commonwealth of Massachusetts, duly commissioned and sworn, do hereby certify as follows, viz:

That on the fourth day of January, A. D. 1890, at the office of the Hon. John Lowell, No. 3 Pemberton square, in Boston, in said county, personally appeared said Hans Andreasen, that he was then by me first duly cautioned and sworn to testify the whole truth to the issue in said causes, that he was then by me carefully examined through G. Lootz, interpreter, who was duly sworn by me to truly interpret, and gave the foregoing deposition in answer to interrogatories and cross interrogatories proposed, as hereinbefore set forth, by the counsel before named for the respective parties in said causes. That the testimony so given by the said witness was by me taken stenographically, and afterwards reduced to writing, and read over by said deponent, and said deponent then subscribed the same in my presence, as and for his deposition.

That said deposition was taken at the request of Hon. John Lowell and Edward S. Dodge, counsel as aforesaid in said causes, and that notices in writing were served as per annexed copies. That the reason for taking said deposition was, that the witness lives at a greater distance than one hundred miles from the place of trial, and is bound on a voyage to sea. That said deposition has been retained

by me until properly completed, signed and certified, and was then by me transmitted to the clerk of the Massachusetts District Court.

I further certify that I am not of counsel, or attorney for either of the parties in said causes, nor in any manner interested in the result thereof.

In testimony whereof I have hereunto set my hand and notarial seal, at said Boston, this thirteenth day of January, A. D. 1890.

[SEAL] WALTER ROGERS,
Notary Public.

Fees.		
Magistrate, for taking,		$10 00
Travel,	Attendance,	
2 miles,	1 day,	
10c.	$1 50,	1 60
		$11 60

[COPY]

U. S. DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

WILLIAM W. BLACK *v.* BARK ELIZA LINES, HER CARGO AND FREIGHT.

Please take notice that on Saturday, Jan. 4, 1890, at 10.15 A. M., at the office of the Hon. John Lowell, Counsellor at Law, at 3 Pemberton square, Boston, before Walter Rogers, Esq., a Notary Public duly authorized, the deposition of Hans Andreasen, a witness in the above entitled cause, who lives at a greater distance than one hundred miles from the place of trial, and who is bound on a voyage to sea, will be taken on behalf of the libellant, and of Hans Andreasen, claimant of said bark and cargo; and you are hereby invited and notified to be present, and to put such interrogatories as you may think fit. Yours very respectfully,

EDWARD S. DODGE,
Proctor for Libellant.
JOHN LOWELL,
Proctor for HANS ANDREASEN,
Claimant of the Bark Eliza Lines, and Cargo.

To LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
Attorneys and Proctors for B. DARRACH, *Claimant of said cargo on behalf of* JAMES E. WARD & CO.

BOSTON, Jan. 3, 1890.

[COPY]

UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

JAMES E. WARD *et al.* *v.* CARGO OF BARK ELIZA LINES.

Please take notice that on Saturday, Jan. 4, 1890, at 10.15 A. M., at the office of Hon. John Lowell, Counsellor at Law, at 3 Pemberton square, Boston, before Walter Rogers, Esq., a Notary Public duly authorized, the deposition of Hans Andreasen, a witness in the above entitled cause, who lives at a greater distance than one hundred miles from the place of trial, and who is bound on a voyage to sea, will be taken on behalf of the claimant and respondent; and you are hereby invited and notified to be present, and to put such interrogatories as you think fit.

Yours respectfully,
JOHN LOWELL,
EDWARD S. DODGE,
Proctors for HANS ANDREASEN,
Claimant of said cargo, and Respondent.

To LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
Attorneys and Proctors, JAMES E. WARD *et al.*, *Libellants.*

BOSTON, Jan. 3, 1890.

[COPY]

U. S. DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

HANS ANDREASEN *v.* 295,000 FEET OF LUMBER *et al.*

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dred miles from the place of trial, and who is bound on a voyage to sea, will be taken on behalf of the libellant; and you are hereby notified and invited to be present, and to put such interrogatories as you may think fit. Yours respectfully,

JOHN LOWELL,
EDWARD S. DODGE,
Proctors for Libellant.

To LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
Attorneys and Proctors for BRADFORD DARRACH AND JAMES E. WARD *et al.*

BOSTON, January 3, 1890.

CHARTER PARTY.

[Marked for Identification "W. R."]

JAMES E. WARD & Co.,
NEW YORK.

This charter party made and concluded upon in the city of New York, the fifth day of February, 1889, between Funch, Edye & Co., of the Norwegian bark Eliza Lines of Farsund, of the burthen of 448 tons, or thereabouts, register measurement, now bound to Buenos Ayres, of the first part, and James E. Ward & Co., of New York, of the second part, witnesseth: That the said party of the first part agrees on the freighting and chartering of the whole of the said vessel (with the exception of the cabin, and necessary room for the crew, and storage of provisions, sails and cables) unto said party of the second part, for a voyage from Pensacola, Fla., to Montevideo for orders to discharge at Montevideo or Buenos Ayres. Forty-eight hours allowed waiting orders at Montevideo. One port only to be used for discharging, on the terms following: The said vessel shall be tight, stanch, strong, and in every way fitted for such a voyage, and receive on board during the aforesaid voyage, the merchandise hereinafter mentioned, and no goods or merchandise shall be laden on board, otherwise than from the said party of the second part, or their agent, without consent expressed in writing. The said party of the second part do engage to provide and furnish to the said vessel a full cargo of resawn pitch-pine lumber, under and on deck, and to pay to said party of the first part, or agent, for the use of said vessel during the voyage aforesaid: If vessel is unloaded at Montevideo, twenty; if at Buenos Ayres twenty dollars gold, per thousand superficial feet, board measure, intake survey on lumber delivered from under deck. Two thirds of above rates for cargo delivered from on deck. The freight is earned and payable upon correct delivery of cargo at port of discharge, in United States gold dollars, or their equivalent in

other gold coin. Cargo to be furnished at port of loading, at an average rate of not less than twenty thousand feet per running day, and to be discharged at an average rate of not less than twenty thousand feet per running day, Sundays excepted in both cases, commencing from the time the vessel is ready to receive or discharge cargo at her port of loading or discharging, and notice thereof is given to said party of the second part, or their agent in writing. And for each and every day's detention by default of said party of the second part, or their agent, forty-four gold dollars, day by day, shall be paid by said party of the second part, or their agent, to the said party of the first part or their agent. The cargo or cargoes to be delivered and received alongside within reach of vessel's tackles. Bill of Lading to be signed as required, without prejudice to this charter, but not less than chartered rates.

The dangers of the seas, fires and navigation always mutually excepted.

The vessel to go consigned to friends of the charterer at port of discharge, paying them a commission of two and one half per cent. on amount of charter, for doing vessel's inward business. It is understood and agreed that individual responsibility of charterer ceases upon delivery of cargo to the vessel, but the vessel has a lien upon the cargo for all freight, dead freight and demurrage. Should vessel be ordered to Buenos Ayres, consignees have privilege of discharging her at a wharf on the Riachuelo (Boca), they paying all Boca charges and lighterage if required. In the event of vessel loading outward, in the Riachuelo, vessel to pay outward charges. Captain to open hatches whenever practicable during the voyage, in order to ventilate cargo. Vessel to proceed with all possible despatch from Buenos Ayres to Pensacola in ballast, to enter upon this charter.

To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, each to the other, in the penal sum of estimated amount of this charter.

In witness whereof, we hereunto set our hands, the day and year above written.

FUNCH, EDYE & CO., *Agents.*
JAMES E. WARD & CO.

Signed and delivered in the presence of

HERMANN DILL.

A correct copy of original charter in our possession.

JAMES E. WARD & CO.

At the side of the foregoing charter party is the following, viz:

A commission of five per cent. and customary freight brokerage, upon the gross amount of this charter, and demurrage, is due by the owners to Messrs. Funch, Edye & Co., upon the signing of this charter, vessel lost, or not lost.

BILL OF LADING.

[Marked for Identification "W. R."]

Shipped in good order and condition by James E. Ward & Co. on board the bark called the Eliza Lines, whereof H. Andreasen is master, now lying at the Port of Pensacola, and bound for Montevideo for orders, to say (15,507) fifteen thousand five hundred and seven pieces yellow pitch-pine lumber, containing (322,082) three hundred and twenty-two thousand and eighty-two linear and (294,534) two hundred and ninety-four thousand five hundred and thirty-four superficial feet. Of the above (746) seven hundred and forty-six pieces, containing (18,199) eighteen thousand one hundred and ninety-nine linear, and (34,200) thirty-four thousand two hundred superficial feet, are *on deck* — the balance *under deck*.

All on board to be delivered. Measurement unknown. Not accountable for splits or stains,— being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of as per charter party (the dangers of the seas only excepted), unto Messrs. Thomas Drysdale & Co., or to their assigns, he, or they, paying freight for the said, as per charter party, with average accustomed.

In witness whereof the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished the others to stand void.

Dated in Pensacola, the 8th day of August, 1889.

[*On the margin is written* "Master's Copy".]

EVIDENCE FOR CLAIMANTS OF CARGO.

Depositions of witnesses examined upon the interrogatories and cross-interrogatories, annexed to a commission in this case, taken before EDWARD L. PATTERSON, *a Notary Public, at the city of New York, on the twelfth day of February*, 1890.

DEPOSITION OF MATTHIAS NICOLL.

Matthias Nicoll, being first duly sworn, in answer to the several interrogatories and cross-interrogatories propounded to be answered by him, and annexed to the said commission, deposeth as follows:

Interrogatories by Mr. DABNEY *and* Mr. CUNNINGHAM.

Q. 1. State your name, age, residence and occupation. *A.* Matthias Nicoll; forty-eight; New York City; Auditor of the Atlantic Mutual Insurance Company.

Q. 2. Please state whether the Atlantic Mutual Insurance Company of New York made to James E. Ward & Company an open policy of insurance, dated twelfth of June, 1889, in the sum of two hundred thousand dollars, upon shipments and cargoes to be thereafter indorsed upon said policy; and, if yea, whether a shipment or cargo of lumber was thereafter, with the consent of said company, indorsed upon said policy on a voyage from Pensacola to Montevideo or Buenos Ayres by the bark Eliza Lines. *A.* Yea, yea.

Q. 3. If you shall say that said policy and indorsement were made, please produce the said policy and indorsement before the magistrate, taking your deposition, to be by him marked and identified as produced by you in answer to this interrogatory, and state whether you have done so; and please have a copy of said policy and indorsement certified by said magistrate and annexed to your deposition, and state whether you have done so. *A.* I have produced the policy; I have had a copy of the said policy certified by the magistrate, and annexed hereto.

Q. 4. State whether said Atlantic Mutual Insurance Company has received from said James E. Ward & Company a letter of abandonment of said cargo of said bark Eliza Lines; and, if yea, please state when the same was received by said company, and produce the same before the magistrate taking your deposition, to be by him marked and identified as produced by you in answer to this interrogatory, and state whether you haved one so; and please have a copy of said letter of abandonment certified by said magistrate and annexed to your deposition, and state whether you have done so. *A.* Yea; on, or about the nineteenth of September, 1889. I have produced the letter of abandonment; I have had a copy of said letter certified and annexed hereto.

5. Are you familiar with the signature of James E. Ward & Company, and, if yes, state how you became so, and state whether the signature to said letter of abandonment, purporting to be that of said James E. Ward & Company, is genuine? *A.* Yea; from having frequently seen it on various documents, and from having seen members of the firm sign the signature; yea, the signature is genuine.

Q. 6. Please state whether said Atlantic Mutual Insurance Company accepted the abandonment of said cargo of said bark Eliza

Lines, and whether said company has paid said James E. Ward & Company, for a loss of said cargo, and, if yes, state how much was paid to said Ward & Company by said company for said loss, and the date or dates when such payment was made? *A.* I do not remember that the company ever formally accepted the letter of abandonment; yes, they have paid; the company paid forty-five hundred and sixty dollars ($4,560) on the twenty-sixth of November, 1889.

Cross-Interrogatories by Mr. DODGE *and* Mr. LOWELL.

Said libellant, and claimant of said bark, object to interrogatories 2, 3, 4, 5 and 6, as incompetent, irrelevant and immaterial; and not waiving said objection, but insisting thereon, said libellant and claimant of said bark propound the following cross-interrogatories, *de bene esse*.

×-*Q.* 7. If you have testified that the Atlantic Mutual Insurance Company has accepted the abandonment of said cargo of said bark Eliza Lines, or has paid said James E. Ward & Company for a loss of said cargo, state particularly upon what day, and at what hour of the day, said abandonment was accepted, and upon what day and at what hour of the day, said payment was made. *A.* I have testified that I do not remember that the company ever formally accepted the notice of abandonment; it was paid on the twenty-sixth of November, 1889; the hour of the day, I do not remember; probably between ten and three o'clock.

×-*Q.* 8. Do you know of any facts or circumstances connected with the acceptance of said abandonment, or the payment for said loss, that indicate, or tend to indicate, why said abandonment was accepted, or said payment was made upon the day upon which, or at the time at which, you have testified that said abandonment was accepted, or said payment was made, rather than earlier, or later? If yes, state said facts, or circumstances fully. *A.* No.

×-*Q.* 9. Have you any knowledge, and, if yes, state fully what knowledge you have, of any communications, in writing or otherwise, between said James E. Ward & Company, or any member or employee of said firm, and said Atlantic Mutual Insurance Company, or any agent or employee of said company, or between said James E. Ward & Company, or any member or employee of said firm, or said

Atlantic Mutual Insurance Company, or any agent or employee of said company, and any other person or persons, in reference to the acceptance of said abandonment, or the payment of said loss, or in relation to the acceptance of said abandonment, or the payment of said loss at the particular time at which you have testified that said abandonment was accepted, or said payment was made? Please state particularly the time at which said communications, if any, were made or received. *A.* No.

×-*Q.* 10. Please annex to your deposition all of such communications inquired about in the preceding cross-interrogatory, as were in writing, or produce before the magistrate who takes your deposition copies of all such communications, and cause said copies to be attested by said magistrate and annexed to your deposition, and state whether you have done so. *A.* I know of none such.

×-*Q.* 11. Is it not the fact that said abandonment was accepted or said loss was paid at the particular time at which said abandonment was accepted, or said loss was paid, in consequence of information received by said Ward & Company, or by said Atlantic Mutual Insurance Company, either or both, by the agents of either or both, to the effect that suit or legal process of some kind was about to be brought in Boston against said Ward & Company, to compel them to pay freight upon said cargo of said bark Eliza Lines, or in consequence of other information received from Boston regarding said freight? *A.* No; no such information was had at the time by said Atlantic Mutual Insurance Company, and the payment was not made for any such reason.

×-*Q.* 12. If you have answered the preceding cross-interrogatory affirmatively, state fully what the information was, and from whom it was received, and when it was received, and in what manner? *A.* I have answered the preceding cross-interrogatory in the negative.

×-*Q.* 13. Have you heard, seen or been informed of the foregoing interrogatories, or cross-interrogatories, them, or any of them, or of the substance of them, or any of them, previous to said interrogatories or cross-interrogatories being put to you by the magistrate? If yes, of which of them have you been so informed, and by whom? *A.* I have neither heard, seen, nor been informed of any of them.

MATTHIAS NICOLL.

N. B. The foregoing interrogatories are by L. S. Dabney and Frederic Cunningham, Esquires, proctors for claimants of cargo.

Cross-interrogatories by Edward S. Dodge, Esq., proctor for libellant.

John Lowell, proctor for claimant of bark Eliza Lines.

LETTER OF ABANDONMENT OF CARGO.

James E. Ward, Special — Henry P. Booth. — William H. T. Hughes.

JAMES E. WARD & Co.,
113 Wall Street.

P. O. Box 1026. NEW YORK, Sept. 19, 1889.

THE ATLANTIC MUTUAL INSURANCE Co.,
City.

Dear Sirs, — We enclose letter requested by you in relation to matter of cargo on board the Eliza Lines, which vessel was abandoned at sea and towed into Boston, and beg to notify you that we abandon cargo to you, and shall, of course, claim for a total loss.

Yours truly,

JAMES E. WARD & Co.

Enclos.

Original B/Ldg. (*Endorsed*) Exhibit 1.

Copy Invoice.

Copy of a paper produced by Matthias Nicoll at the execution of a commission for the examination of witnesses, in a certain suit entitled William W. Black, libellant, against the bark Eliza Lines, her cargo, etc., and by him sworn and deposed to at the time of his examination.

EDWARD L. PATTERSON,
Notary Public, Commissioner.

NEW YORK, Feb. 12, 1890.

[COPY]

ASSIGNMENT, WARD & COMPANY TO ATLANTIC MUTUAL INSURANCE COMPANY.

(1) X These presents, made, and concluded, the twenty-sixth day of November, in the year of our Lord one thousand eight hundred and eighty-nine between Henry P. Booth and William H. T. Hughes, general partners, and James E. Ward, special partner, composing the Mercantile firm of James E. Ward & Co., party or parties of the first part, and the Atlantic Mutual Insurance Company, of the second part; whereas, by a certain policy of insurance, No. 57,662, bearing date the twelfth day of June in the year 1889, and by endorsement on said policy bearing date the sixth day of July in

the year 1889 the said party of the second part become the assurers of the said party or parties of the first part, upon merchandise shipped on board the good bark or vessel called the Eliza Lines, whereof H. Andreasen was master, on a voyage from Pensacola to Montevideo, and the property so insured is more particularly and fully described as follows: —

(15,507) Fifteen thousand five hundred and seven pieces Yellow Pitch Pine Lumber, containing (322,082) three hundred and twenty-two thousand and eighty-two linear and (294,534) two hundred and ninety-four thousand five hundred and thirty-four superficial feet. Of the above (746) seven hundred and forty-six pieces containing (18,199) eighteen thousand one hundred and ninety-nine linear and (34,200) thirty-four thousand two hundred superficial feet are on deck, the balance under deck. And whereas, detriment and loss having accrued to the said insured property, by reason of some of the perils in the said policy mentioned or described, the said party or parties of the first part *has* or have rendered to the said party of the second part an abandonment and cession of the said insured property, and all the right, title, interest, claim and demand of the said party or parties of the first part, and of all parties interested for whom such insurance was made of, in, and to the same, for the purpose of claiming and receiving payment of its full insured value as upon a total loss thereof. And whereas the said party of the second part have accepted the said cession and abandonment, and have therefore paid to the said party or parties of the first part the sum adjusted under and in pursuance of the said policy of insurance as and for the full value of the said property insured, as upon a total loss thereof, and in full satisfaction of the sum by the said policy insured, and of all things in the said policy contained, on the part of the said company to be performed: Now, therefore, this indenture witnesseth, That the said party or parties of the first part, in consideration of the said sum of forty-five hundred and sixty dollars so as aforesaid paid to him or them by the said party of the second part, the receipt whereof is hereby acknowledged, *has* or have bargained, sold, assigned, transferred, ceded, abandoned, and set over, and by these presents *do* bargain, sell, assign, transfer, cede, abandon, and set over, unto the said party of the second part and their successors and assigns, the aforesaid insured property and the proceeds thereof, in whatever form or place or in whosoever hands the same may be, and all the right, title, interest, trust, claim and demand of the said party or parties of the first part, therein and thereto; to have and to hold, recover, receive, and take the said insured property and the proceeds thereof, unto the said party of the second part, to the only proper use and benefit of the said party of the second part and their successors and assigns for ever. And the said party or parties of the first part, and each of them for himself and his executors and administrators, and for and in behalf of

every other person or party whom he or they was or were, in effecting insurance, or now is or are authorized to represent, insure, collect, abandon, or act for in the premises do and *doth* by these presents, release, and forever discharge, the said party of the second part, and their successors, of and from all actions and suits, and causes of actions and suits, promises, agreements, losses, damages, charges, expenses, costs, claims, and demands whatsoever, both at law and in equity, by reason or in virtue of the policy of insurance herein above mentioned. And the better to enable the said party of the second part, to recover and receive the hereby assigned and ceded premises, it is agreed that any further assurance or evidence of right and title to the said insured property or its proceeds that may be reasonably required by the party of the second part, shall upon request be given, subject only to such legal claims thereon as may have been contemplated by said policy or have arisen from the perils against which the party of the second part so insured; and for the same purpose, the said party or parties of the first part *hath* or have made, ordained, constituted, and appointed, and by these presents *do* make, ordain, constitute and appoint, the said party of the second part, and their successors, the attornies irrevocable of the said party or parties of the first part, and of any other, for whom they or he were or was or is or are authorized to insure or collect or act in the name of the said party or parties of the first part, or otherwise, but to and for the proper use and benefit of the said party of the second part, and their successors and assigns by all lawful ways and means, to ask, demand, sue for, recover and receive the said insured property, and all monies thence arising, and all damages of and concerning the same, of and from all and every king, prince, potentate, state, person and persons whomsoever; and for the purposes aforesaid, in the name or on the behalf of the said party or parties of the first part, or otherwise, but at the proper costs and charges of the said party of the second part, and their successors and assigns, to appear, prosecute, and plead, in all courts and places whatsoever, and all suits, disputes, or differences, in any wise respecting the premises, to compound and agree, or refer to arbitration, upon such terms and principles, and in such manner and form, as to the said party of the second part, and their successors and assigns, shall appear fit and expedient: And all needful acquittances, discharges, receipts, deeds and writings, touching the premises, in the name, place and stead of the said party or parties of the first part, from time to time to make, execute, and deliver, and generally to do and perform all lawful acts, matters, and things whatsoever touching the premises, in as full and ample a manner as the said party or parties of the first part, if personally present, might or could do, or as if more special authority were given them. And one or more attorney or attornies, under them the said party of the second part,

for the purposes aforesaid, from time to time to appoint, and at their pleasure to revoke.

In witness whereof, the said party or parties of the first part have or *have* to these presents set his or their hand and seal, and the said party of the second part, have also to these presents caused their seal to be affixed, and the same to be subscribed by their President or Vice President, and countersigned by their Secretary, on the day and in the year first above written.

(Sgd.) JAMES E. WARD & CO.
WM. H. T. HUGHES.

(Sgd.) ATLANTIC MUTUAL INSURANCE COMPANY,
[SEAL] *by* W. H. H. MOORE, *Vice President.*

Attest:

(Sgd.) J. H. CHAPMAN, *Secretary.*

Signed, sealed and delivered in the presence of
J. FRANK DUNHAM.

[ENDORSEMENT.]

Duplicate. Bark Eliza Lines. Assignment of Merchandise to the Atlantic Mutual Insurance Company, by James E. Ward & Co. New York, Nov. 26, 1889.

Nov. 29, 1889. Original assignment sent L. S. Dabney.

[COPY OF INSURANCE POLICY ON CARGO.]

1

(CARGO.) (No. 57,022)

BY THE ATLANTIC MUTUAL INSURANCE COMPANY.

JAMES E. WARD & CO. (Export), on account of Whom it may concern.
In case of loss, to be paid in funds current in the United States, or in the
309107 city of New York, to them.
Do make Insurance, and cause to be insured,
lost or not lost, at and from ports and places to ports and places.

No shipment to be considered as insured, until approved and endorsed on this Policy by this Company.

Endorsements valued at the same, provided they do not vary from the cost more than twenty per cent. and the sound value at the port or place of destination is not to be deemed to exceed ten per cent. on the purchasing prices at the shipping port.

Each extended amount of invoice of not less than $2,000 insured value, and of amounts less than $2,000 collectively, in the order of invoice, subject to separate average as if separately insured.

Trunks, Canned Goods, and Smoked and Dry Salted Meats, free of particular average under 20 per cent. Printed Matter, Show Cards, Show Cases, Wrapping Paper, Matches, Fire Crackers, Fire Works, Oil Meal, Castor Beans and articles used for fertilizing, free of particular average.

upon all kinds of lawful goods and merchan-

Goods, laden or to be laden on board the good vessel or vessels, whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Beginning the adventure upon the said goods and merchandises, from and immediately following the loading thereof on board of the said vessel, at as aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at as aforesaid.

Sum Insured, $10,000. *And* it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance. The said goods and merchandises, hereby insured, are valued (premium included) at

Touching the adventures and perils which the said ATLANTIC MUTUAL INSURANCE COMPANY is contented to bear, and takes upon itself in this voyage, they are of the *seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints, and detainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the master and mariners*, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. *And* in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safe-guard and recovery of the said goods and merchandises or any part thereof, without prejudice to this insurance: nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said Insurance Company will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance, by the assured, or assigns, at and after the rate of three per cent., the premium on risks to be fixed at the time of endorsement; and such clauses to apply as the Company may insert, as the risks are successively reported.

And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said (the amount of the Note given for the premium, if unpaid, being first deducted.) but no partial loss or particular average shall in any case be paid, unless amounting to *five per cent.* PROVIDED ALWAYS, and it is hereby further agreed, That if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said ATLANTIC MUTUAL INSURANCE COMPANY shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said ATLANTIC MUTUAL INSURANCE COMPANY shall return the premium upon so much of the sum by them assured, as they shall be, by such prior assurance, exonerated from *And* in case of any insurance upon the said premises, subsequent in day of date to this policy, the said ATLANTIC MUTUAL INSURANCE COMPANY shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said ATLANTIC MUTUAL INSURANCE COMPANY shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. IT IS ALSO AGREED, that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

Premium, $6,000 Policy, 1.25 $6,001.25

Warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this Company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade; but in the event of blockade, to be at liberty to proceed to an open port, and there end the voyage.

IN WITNESS WHEREOF the President or Vice-President of the said ATLANTIC MUTUAL INSURANCE COMPANY hath hereunto subscribed his name and the sum insured, and caused the same to be attested by their Secretary in New York, the 12th day of June, one thousand eight hundred and eighty-nine.

Memorandum. It is also agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wicker-ware and willow, (manufactured or otherwise.) salt, grain of all kinds, tobacco, Indian meal, fruits, (whether preserved or otherwise.) cheese, dry fish, hay, vegetables and roots, rags, hemp, yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under *twenty per cent.*, unless general; and sugar, flax, flax-seed and bread, are warranted by the assured free from average under *seven per cent.*, unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under *ten per cent.*, unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise as far as practicable. Not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage

In all cases of return of premium, in whole or in part, *one half per cent.*, upon the sum insured, is to be retained by the assurers.

$200,000. Two hundred thousand dollars.

Secretary. *President.*

[*In the margin is printed:*]

[2.] Warranted by the assured, that vessels loading Grain from the ports of New York, Philadelphia or Baltimore, for Foreign Ports, are to be loaded under the inspection of the Surveyor of the Board of Underwriters, and his certificate as to their proper loading and sea-worthine-s obtained.

[11.] Warranted by the assured free from claim on account of capture, seizure, detention or destruction, by or arising from any belligerent nation, or by or from any officer, civil or military, or other person claiming to act in their name, or under their authority, or in their behalf.

[18.] Proof of loss to be authenticated by the Agent of the Company, if there be one at the place such proofs are taken.

[*On the second page of this policy is the following:*]

DATE.	VESSELS.	FROM	TO	Amount Insured.	Rate of Premium.	Am'nt of Premium.	REMARKS.
1889. July 6	Bk. Eliza Lines	Pensacola	Montevideo or Buenos Aires	$3,980 550	½ ⅛	$1 25 218 90 92 80	for Policy. Lumber. do. on dk. & d. (Memo from Record.)

[*This policy is endorsed as follows:*]

12th June, 1889

ATLANTIC MUTUAL INSURANCE COMPANY.

JAMES E. WARD & CO. (Export).

P. and P.

VESSEL OR VESSELS.

CARGO.

$200,000 at 3 per cent.,	$6,000.00
Policy,	1.25
	$6,001.25

Record, 251. Folio, 57,662.

[*This policy is also endorsed as follows:*]
Nov. 26, /89, pay total loss on cargo per B'k Eliza Lines, from Pensacola to Montevideo, en'd July 6, /89 — $3,980, under deck.
580, on deck.

Total $4,560
Total loss $4,560

Take assignment and affidavit.
Sign'd, approved by M. Nicoll, Auditor.
Signed W. H. H. M. V. P.
Paid Nov. 26, /89.
R. P. 114, fo 27.
by J. M. C.

CERTIFICATE OF COMMISSIONER.

At the execution of a commission for the examination of witnesses in a certain suit entitled William W. Black, libellant, against the Bark Eliza Lines, her cargo, etc., the within paper was produced by Matthias Nicoll, and sworn to by him as a true copy of so much of an open policy, issued by the Atlantic Mutual Insurance Company, to James E. Ward & Company, as relates to the bark Eliza Lines, which said policy was also by him produced and deposed unto at the time of his examination.

Dated, N. Y., Feb'y 12th, 1890.

EDWD. L. PATTERSON,
Notary Public,
Comm'r.

Interrogatories propounded by claimants of cargo, to take the depositions of J. Frank Dunham and J. H. Chapman, both of the city of New York, witnesses to be examined for said claimants.

DEPOSITION OF J. FRANK DUNHAM.

J. Frank Dunham, being first duly sworn, in answer to the several interrogatories and cross-interrogatories propounded, to be answered by him, and annexed to the said commission, deposeth as follows:

Interrogatories by Mr. DABNEY.

Q. 1. What is your name, age, residence and occupation? *A.* John Frank Dunham; thirty-one years; 29 Herkimer street, Brooklyn; I am with James E. Ward & Company, employed by them.

Q. 2. Please look at the annexed instrument dated twenty-sixth of November, 1889, and purporting to be executed by James E. Ward & Company and the Atlantic Mutual Insurance Company, as parties, the former by William H. T. Hughes and the latter by W. H. H. Moore, Vice-President, and to be signed by you as an attesting witness, and state whether you signed said instrument as an attest-

ing witness, whether the signature on said instrument, purporting to be yours, is your signature, and whether said instrument was executed in your presence by said parties, or by either of them, and if by only one of them, by which one. Also who executed said instrument and signed the same for, or in behalf of, said James E. Ward & Company, and who executed and signed the same for, or in behalf of, the Atlantic Mutual Insurance Company. *A.* I signed said instrument as an attesting witness; the signature purporting to be mine is my signature; the said instrument was executed in my presence by only one of said parties, — James E. Ward & Company; William H. T. Hughes executed said instrument and signed the same for James E. Ward & Company; I did not attest to the signature of the Atlantic Mutual Insurance Company.

Cross interrogatories by Mr. DODGE and Mr. LOWELL.

Said libellant and claimant of said bark object to interrogatory 1, as incompetent, irrelevant and immaterial; and not waiving said objection, but insisting thereon, said libellant and claimant of said bark propound the following cross interrogatories, *de bene esse*:

×-*Q.* 3. Upon what day, and at what hour of the day, was the instrument, concerning which you have been interrogated on direct examination, executed by the parties? *A.* I don't remember.

×-*Q.* 4. Do you know of any facts or circumstances connected with the execution of said instrument that indicate, or tend to indicate, why said instrument was executed upon the day upon which you have testified that it was executed, rather than earlier or later? If yes, state said facts or circumstances fully. *A.* I do not remember the date; I understood that the matter had reached the point where they were prepared to settle, owing to the stage that the proceedings in Boston against the Atlantic Mutual Insurance Company had arrived at.

×-*Q.* 5. State if you have any knowledge, and, if yes, state fully what said knowledge you have, of any communications in writing or otherwise, between said James E. Ward & Company, or any member or employee of said firm, and said Atlantic Mutual Insurance Company, or any agent or employee of said company, in reference to the execution of said instrument, or in relation to its exec-

tion at the particular time at which you have testified that it was executed. State also if you have any knowledge, and, if yes, state fully what said knowledge you have, of any communications, in writing, or otherwise, between said James E. Ward & Company, or any member or employee of said firm, and any other person or persons, or between said Atlantic Mutual Insurance Company, or any agent or employee of said company, and any other person or persons, in reference to the execution of said instrument, or in relation to its execution at the particular time at which you have testified that it was executed. Please state particularly the time at which said communications, if any, were made, or received. *A.* I do not remember anything more than I state above.

×-*Q.* 6. Annex to your deposition all of such communications inquired about in the preceding cross-interrogatory, as were in writing, or produce before the magistrate who takes your deposition copies of all such communications, and cause said copies to be certi, fied by said magistrate and annexed to your deposition and state whether you have done so. *A.* I do not remember that there was anything done in writing, outside of this instrument to which I attested.

×-*Q.* 7. Is it not the fact that said instrument was executed at the particular time at which it was executed, in consequence of information received by said Ward & Company, or by said Atlantic Mutual Insurance Company, either or both, or by the agents of either or both, to the effect that suit or legal process of some kind was about to be brought in Boston against said Ward & Company, to compel them to pay freight upon said cargo of said bark Eliza Lines, or in consequence of other information received from Boston regarding said freight? *A.* As stated above, I understood that the matter had reached the point where the Atlantic Mutual wanted to settle the claim. James E. Ward & Company had nothing to do with the case that was pending in court.

×-*Q.* 8. If you have answered the preceding cross-interrogatory affirmatively, state fully what the information was, and from whom it was received, and when it was received, and in what manner. *A.* I understood from Mr. Darrach that the matter had reached the point where the Atlantic Mutual Insurance Company was prepared

to settle, owing to the stage the proceedings against his company had arrived at in Boston.

×-*Q.* 9. Have you heard, seen or been informed of the foregoing interrogatories or cross-interrogatories, them, or any of them, or of the substance of them, or any of them, previous to said interrogatories or cross-interrogatories being put to you by the magistrate? If yes, of which of them have you been so informed, and by whom? *A.* No.

J. FRANK DUNHAM.

N. B. The foregoing interrogatories are by L. S. Dabney, Esq., proctor for claimants of cargo.

Cross-interrogatories by Edward S. Dodge, Esq., proctor for libellant.

John Lowell, Esq., proctor for claimant of bark Eliza Lines.

DEPOSITION OF J. H. CHAPMAN.

J. H. Chapman, being first duly sworn, in answer to the several interrogatories and cross-interrogatories propounded, to be answered by him, and annexed to the said commission, deposeth as follows:

Interrogatories by Mr. DABNEY.

Q. 1. What is your name, age, residence and occupation? *A.* My name is Joseph H. Chapman; over fifty; 246 West Forty-second street, this city; secretary of the Atlantic Mutual Insurance Company.

Q. 2. Please look at the annexed instrument, dated twenty-sixth of November, 1889, and purporting to be executed by James E. Ward & Company, and the Atlantic Mutual Insurance Company, as parties, the former by William H. T. Hughes, and the latter by W. H. H. Moore, Vice-President, and to be signed by you, as an attesting witness, and state whether you signed said instrument as an attesting witness, whether the signature on said instrument, purporting to be yours, is your signature, and whether said instrument was executed in your presence by said parties, or by either of them, and if by only one of them, by which one; also who executed said instrument and signed the same for, or in behalf of, James E. Ward

& Company, and who executed and signed the same, for, or in behalf of, the Atlantic Mutual Insurance Company. *A.* I signed such instrument, as an attesting witness to the signature of W. H. H. Moore, Vice-President; I presume that Mr. Moore signed in my presence; I do not know who executed said instrument for James E. Ward & Company; Mr. Moore signed it on behalf of the Atlantic Mutual Insurance Company.

Cross-Interrogatories by Mr. DODGE *and* Mr. LOWELL.

Said libellant and claimant of said bark object to interrogatory 2, as incompetent, irrelevant and immaterial; and not waiving said objection, but insisting thereon, said libellant and claimant of said bark propound the following cross-interrogatories *de bene esse.*

×-*Q.* 3. Upon what day, and at what hour of the day, was the instrument, concerning which you have been interrogated on direct examination, executed by the parties? *A.* I don't know.

×-*Q.* 4. Do you know of any facts or circumstances connected with the execution of said instrument, that indicate, or tend to indicate, why said instrument was executed upon the day upon which you have testified that it was executed, rather than earlier or later? If yes, state facts or circumstances fully. *A.* No.

×-*Q.* 5. State if you have any knowledge, and if yes, state fully what said knowledge you have, of any communications in writing, or otherwise, between said James E. Ward & Company, or any member or employee of said firm, and said Atlantic Mutual Insurance Company, or any agent or employee of said company, in reference to the execution of said instrument, or in relation to its execution at the particular time at which you have testified that it was executed. State also, if you have any knowledge, and, if yes, state fully what said knowledge you have, of any communication in writing or otherwise, between said James E. Ward & Company, or any member or employee of said firm, and any other person or persons, or between said Atlantic Mutual Insurance Company, or any agent or employee of said company, and any other person or persons, in reference to the execution of said instrument, or in relation to its execution at the particular time at which you have testified that it was executed. Please state particularly the time at which said communications, if

Q. 16. Who was master of her at that time? *A.* Capt. W. Black.

Q. 17. Do you remember what day you left New York on this voyage, on which you picked up the Eliza Lines? *A.* Left New York on a Monday, I think.

Q. 18. September 9? *A.* Yes, sir; I believe it was.

Q. 19. What pilots were on board of her at that time? *A.* There was Black, Behrens, Carr, Connors and myself.

Q. 20. When did you fall in with the Eliza Lines? *A.* Fell in with her on Monday afternoon.

Q. 21. Do you mean the Monday on which you sailed from New York? *A.* No; the Monday following.

Q. 22. That would be Monday, September 16. At about what time? *A.* About,— well, we met her between twelve and one o'clock.

Q. 23. What was the weather at the time? *A.* The weather was squally, dirty, rainy weather. Wind about southwest.

Q. 24. Do you know the latitude and longitude in which you found her? *A.* We was in about 68° 40′ or 50′, and about 40° 4′ we were. The bark was about five miles south of us.

Q. 25. Won't you point out on the chart, just about where this was? Take a pencil and make a mark so as to show the course. *A.* About there [*showing the Court*].

Q. 26. What was the direction of the wind at the time you came up with her? *A.* The wind was southwest.

Q. 27. Now, please describe generally what the condition of the bark was when you fell in with her. *A.* When we fell in with the bark her foremast was gone, cut off about five or six feet above the top of the forward house. The mainmast was gone at the deck. The mizzen-topmast was gone and lower masthead started.

Q. 28. What was the condition of her hatches? *A.* The fore hatch was off.

Q. 29. And the other hatches were on? *A.* No, what we call the lazaret hatch was open. Around the stump of the mainmast, where the mainmast was broke off, I suppose the water went down. There was canvas nailed over it.

Q. 30. What was the condition of her deck load of lumber? *A.* The deck load of lumber seemed to be in pretty good order,

except that a few pieces on the starboard side were shifted forward about five feet, — on the starboard. That on the port side, — the lashing seemed to be all right.

Q. 31. Was there any water in her hold? *A.* Probably ten or eleven feet.

Q. 32. Did you try her pumps? *A.* No, sir.

Q. 33. Did you know what condition the pumps were in? *A.* Tried them afterwards. They would throw a little water and then stop. Couldn't get them to work very well. She had a windmill pump, one of these Norwegian pumps.

Q. 34. Was there anybody on board of her, when you came up with her. *A.* No, sir; nobody only rats.

Q. 35. Was there anybody in sight of her anywhere in the vicinity, when you came up with her? *A.* When we came up, the steamer State of Nebraska passed us going to New York. The next morning, just when we got a line to her, the steamer Nevada passed us. A Scotch steamer spoke us in the evening, before we got the hawser to her.

Q. 36. This was all, after you had fallen in with her? *A.* After we had fallen in with her.

Q. 37. Where is that locality where you found her, with reference to the track of steamers passing in and out? *A.* Just about as near in the track as she could be.

Q. 38. Whether or not in the place you found her, and the condition you found her, she was in danger from steamers? *A.* In a very dangerous place for steamers, I should say.

Q. 39. Was she in any danger of going ashore? *A.* Well, if she had kept on drifting to the northward and eastward, she would probably have fetched up on the Georges.

Q. 40. What direction was she drifting in when you found her? *A.* North-northeast to northeast, as near as we could tell.

Q. 41. When you discovered her, what did you do in reference to her? *A.* When we fell in with her, we was going to the eastward. We hauled up by the wind, made a couple of tacks, and went alongside, and went aboard of her.

Q. 42. Who went on board of her? *A.* I went on board of her with the boatkeeper, one of the boys.

Q. 43. I will ask you who of your pilots were on board at the time you fell in with her? *A.* Mr. Connors and myself.

Q. 44. What had become of the rest? *A.* Put them out on board steamers.

Q. 45. When you went on board of her, what did you do to her? *A.* We got hawsers in that was hanging over her port bow, one large hawser and another one. And we parted three lines that afternoon, trying to get them to the boat. It was coming on dark, and we had to give her up and we laid by her all that night, put a light up on the windmill pump, on one of the arms of the pump. We just laid around her all night, until the next morning about five o'clock, we went on board and got lines to her, one of our lines to her and used her coir hawser.

Q. 46. Why did you have that difficulty passing hawsers the first day? *A.* Well, there was a choppy sea. We couldn't get them over to her.

Q. 47. Had she drifted during the night? *A.* Yes, I suppose she drifted about ten miles.

Q. 48. In what direction? *A.* About northeast.

Q. 49. Now, the next morning, when you went on board of her, that is, Tuesday, Sept. 17, at five o'clock, what did you do to her? *A.* I just told you.

Q. 50. The next morning? *A.* I just told you. I went on board of her, I said, about five o'clock in the morning; ran one of our lines to her, then used the bark's coir hawser; ran it with a small line. Took her in tow with that.

Q. 51. What time did you start to tow her on Tuesday? *A.* I should judge it was about five o'clock, probably a little after, in the morning.

Q. 52. How long did you continue to tow her? In what direction, first of all? *A.* Well, first of all, we was heading to the westward. At noon, we were so far to the northward, we could not fetch New York, and came to the conclusion to square off, up the South channel, and fetch her to Boston.

Q. 53 (by Mr. DABNEY). At noon? *A.* At noon.

Q. 54 (by Mr. DODGE). How long did you continue to tow her up the South channel in the direction of Boston? *A.* We towed

her until between nine and ten o'clock the next morning, as near as I can tell.

Q. 55. Now, step up to the desk, and point out to the Judge, generally, the course you pursued with her.

[*The witness then pointed out the course upon the chart.*]

Q. 56. Where were you Tuesday morning? *A.* Somewhere up here.

Q. 57. Then you started there and towed her to the westward? *A.* We started, and towed up here, about west-northwest. At noon we changed. We was about in 41 latitude when we changed, and we was up somewheres in the 69th longitude. We kept going; we hauled her up northwest by north, and went until we got close up to the shoals. Then we fell off. Next morning we were off Cape Cod.

Q. 58. Off Cape Cod Light? *A.* Yes, sir; just to the southward? It was a thick fog when we came along by the Highlands. It was a thick fog when we went along by the, — went in along by the Highlands.

Q. 59. Whether or not, Captain, this locality where you picked her up is a place where towboats ever go, unless specially sent? *A.* No, sir.

Q. 60. How many miles did you tow her in all, before you met the Underwriter? *A.* I should judge we towed her about ninety miles.

Q. 61. When you fell in with the Underwriter did you make a bargain with her? *A.* Made a bargain with her for four hundred dollars to tow her to Boston.

Q. 62. And what was thereupon done? *A.* We passed a hawser to the Underwriter. She towed us in around towards Providence,— or Provincetown, at least, and signaled for some more, — for her other boats to come down. She turned us over to a boat called the Confidence. So, afterward, assisted by two other boats, we got pretty near up to Boston Light. Then one of the boats took hold of our boat, and the other two brought the bark up to Boston, up to Lewis wharf.

Q. 63. Your schooner came right along in with the bark? *A.* Yes, sir.

Q. 64. After you got to Boston, did you lay alongside of the bark? *A.* Yes, sir.

Q. 65. How long? *A.* We laid alongside of her all the time until she was taken over to the other dock. I left her on Sunday. I don't know exactly how long we laid here. Two or three days afterwards they shifted her to East Boston.

Q. 66. Have you paid this bill of four hundred dollars to the Underwriter for towage? *A.* Yes, sir; paid her the same day we arrived here.

Q. 67. Did you arrive in Boston, at two o'clock on the morning of Thursday, Sept. 19? *A.* Between one and two.

Q. 68. During the time before you met the Underwriter, while towing the bark, whether, or not there was any danger to your vessel? *A.* Our danger was, liability of being run into any time during the night, — thick fog a part of the time; we could just see the bark's side light astern of us in the fog.

Q. 69. Did you have anybody on board the bark, steering her? *A.* Yes, sir; two boys.

Q. 70. Did she steer well? *A.* Yes, she steered very well.

Q. 71. During the time you were towing her, did any of your hawsers sustain any injury? *A.* We parted one.

Q. 72. What was the value of that hawser? State it somewhere near. *A.* Well, I don't suppose the value of that was over ten or twelve dollars; that is, I mean the part we lost.

Q. 73. Now, how many days in all, was your boat absent from her pilotage work, on account of these services? *A.* I think she was here from eight to twelve days.

Q. 74. And at what do you value the services of your boat, a day? *A.* Well, from $75 to $100.

Q. 75. Were there any other expenses connected with this thing besides the injury to your hawser, and the money paid to the towboat? Did you pay anything in the way of wharfage in Boston? *A.* Yes, sir; we paid $80 for wharfage.

Q. 76. And anything for watchmen here to watch the property? *A.* Paid watchmen $40.

Q. 77. Were there any other bills that you recollect, connected with the service? *A.* That is all I recollect.

Q. 78. Do you know anything about the value of the bark, captain? Do you, yourself, know anything about it? *A.* What I would value her at, myself?

Q. 79. Well, I will ask you first of all, have you owned any other vessel excepting the Barrett? *A.* No, sir.

Q. 80. Are you acquainted with the market value of vessels? *A.* Oh, I have got a pretty good idea of what they are worth.

The COURT. Isn't there an agreement about the value?

Mr. DODGE. It was agreed, but I understand that on the other side there is some question. There was a subsequent survey which showed some injury to the bark not known at the time the agreement was entered into I believe Judge Lowell wants to show something about that.

Mr. LOWELL. We have a surveyor's certificate of the dimensions and value. It should be here.. It ought to be here pretty soon.

Mr. DODGE. Then I will not go into that with this witness.

Cross Examination by Mr. DABNEY.

×-*Q.* 81. Captain Hughes, you say you employed a watchman here in Boston? *A.* Yes, sir.

×-*Q.* 82. For what? *A.* In looking out for the bark.

×-*Q.* 83. You put him on board of her? *A.* Yes, sir.

×-*Q.* 84. And you say your boat was detained here? *A.* We was kept. We calculated to settle this thing from day to day, and we kept along with the bark.

×-*Q.* 85. I suppose you might have left the bark here with the watchman on board of her, and gone off yourself? *A.* We didn't think it advisable to do that. We calculated, the way they talked, they was going to square this thing up every day. That is what kept us here.

×-*Q.* 86. Who employed the watchman? *A.* I did, sir.

×-*Q.* 87. Did you give him any instructions? *A.* I gave him instructions for to keep everybody away from her, not allow anybody aboard of her at all.

×-*Q.* 88. How long did he stay on her? Until she was taken over to South Boston? *A.* Yes, sir; until the marshal took charge of her, I believe.

×-*Q.* 89. Did you see anything of the master? *A.* I saw him here one day.

×-*Q.* 90. Where? *A.* In Messrs. Gill & Lootz's office.

×-*Q.* 91. Did you go and see him down at the vessel at all? *A.* No, sir. I was not in Boston all the time until the boat left, you know; I left here Sunday morning: went down on a French man-of-war.

×-*Q.* 92. Went where? *A.* I went to New York. A French man-of-war was lying here in the harbor.

×-*Q.* 93. You went as pilot? *A.* Yes, sir.

×-*Q.* 94. Well, I don't suppose you went for nothing? *A.* No, sir; I don't believe I did.

×-*Q.* 95. Where is Capt. Black? *A.* Capt. Black sprained his ankle last Saturday morning. I don't suppose he will be out of bed for two weeks; probably two weeks, perhaps longer.

×-*Q.* 96. You say this vessel, when you fell in with her, had ten or eleven feet of water in her hold? *A.* That is what they say. They sounded her when they got her to the dock in Boston. We didn't bother with sounding her at all. The bark was just the same when I left her in Boston, as to going down, —about two and one half feet by the head.

×-*Q.* 97. And her mizzen-topmast was gone? *A.* Yes, sir; topmast gone.

×-*Q.* 98. And mainmast? *A.* Mainmast gone close to the deck.

×-*Q.* 99. And foremast? *A.* Foremast cut away on the port side, about five feet above the top of her house forward. The bowsprit and jibboom was in the bark, with head hanging down.

×-*Q.* 100. Was the foremast gone, the part that was cut away? *A* The foremast was cut away.

×-*Q.* 101. Well, but was the part that was cut off hanging there? *A.* No, all clean, all gone.

×-*Q.* 102. You say the forehatch was off? *A.* I said the forehatch was open.

×-*Q.* 103. How was the main hatch? *A.* The main hatch, I suppose, was under the lumber. Couldn't see that.

×-*Q.* 104. That was under the deck load? *A.* Yes, sir. Right

around where the mainmast was gone off short by the deck, there was canvas nailed over it.

X-*Q.* 105. What was the condition of the cabin? *A.* Well, the cabin looked as though there had been some water into it, but it was about dry then.

X-*Q.* 106. Did you go through the vessel? *A.* Only went into the cabin, that is all, cabin and lazaret.

X-*Q.* 107. Could you judge whether they had taken their things with them when they left, or had the things been left on board? *A.* I guess they had taken most of them with them, that was any good. The captain's chronometer was there, I took that, and gave it to him in Boston.

X-*Q.* 108. The captain's what? *A.* Chronometer.

Cross Examination by Mr. LOWELL.

X-*Q.* 109. You got here on Saturday? You got to Boston on Saturday? *A.* Got to Boston on Thursday morning.

X-Q. 110. And went off as pilot on a man-of-war on Sunday? *A.* Sunday morning.

X-*Q.* 111. Were any pilots left here? *A.* Mr. Black was left here.

X-*Q.* 112. Well, he was not on board? *A.* No, he came on from New York.

X-*Q.* 113. He is all the pilot that was left? *A.* Yes, sir; Mr. Connors and myself went on with two men-of-war, and left Mr. Black in Boston.

X-*Q.* 114. Both of you went? *A.* Yes, sir.

X-*Q.* 115. In reckoning your vessel's being worth $75 or $100 a day, is that merely for the use of the vessel, without any pilot? *A.* Well, there aint anybody could charter her for $75 a day. That is the way I look at it. Sometimes she is worth more money than that.

X-*Q.* 116. How do you estimate it? How do you get at the $75 or $100 a day? *A.* How do I get at it?

X-*Q.* 117. Yes. *A.* I say that is what she is valued at to us, for her time.

X-*Q.* 118. Yes, I know, but how do you reckon it? You must

have some mode of reckoning the $75 or $100; it is not all wage and provisions, is it? *A.* No; sometimes we make that. A goo month she is worth that to us. Other times, when we pay our ex penses and everything, we share from twenty-five to twenty There have been such things as working a whole month, and didn share anything.

×-*Q.* 119. Then it is reckoned on about the average earnings *A.* Yes, that is about the way it is.

×-*Q.* 120. On the average earnings of the pilots? But there were no pilots after you left her? *A.* No, but we had partners i New York, waiting for the boat at this time.

×-*Q.* 121. How long did your four boys and cook remain here? All the time? *A.* I think there was three of them left her after wards. We had to ship new men in their places.

×-*Q.* 122. Oh, they left you? Then you did not keep them *A.* We kept them until pretty near the time of the boat leaving here

×-*Q.* 123. How long did you keep them? *A.* Well, the was all here when I left Sunday. I believe they left sometime i the beginning of the week, probably Monday or Tuesday. I don know exactly when they left.

Direct Examination resumed by Mr. DODGE.

Q. 124. Considering what the weather was after your arriv in Boston, how long a time would reasonably have been occupied b you to get the boat back to the place where you picked up th Eliza Lines? From the time you arrived in Boston until yo could get back, about what length of time would have been reason ably necessary? That is to say, for you to resume the voyage o which you were, in the pilot service? *A.* Well, we could hav left here, — it was blowing a gale, the wind was N. W., — we cou have left here, and been down there in about twelve hours, I suppos

Q. 125. Do you know at what price you could charter a boa fit for the pilot service and equipped as the Edward E. Barn was on this voyage, in New York, at that time? *A.* No, sir; I d not.

Q. 126. Can you give any estimate of it? *A.* I never kne any to be chartered.

Q. 127. What was the tonnage of your vessel? A. Sixty-five tons.

Q. 128. Supposing she were fit for coal carrying, how much coal would she carry? A. I don't think she would carry much coal. She is not built for that.

Q. 129 (by the COURT). Built for a pilot boat? A. Yes, sir; for a pilot boat.

Cross Examination resumed by Mr. DABNEY.

X-Q. 130. Do you think, captain, if you had not met the Underwriter, you would have met that northwest gale? A. The wind was just hauled to the northwest, when I made the bargain, — came on with a squall, when I got their hawser. If I hadn't, I suppose the Underwriter would have wanted five or six hundred more for her work.

X-Q. 131. On account of the change in the weather? A. Yes, on account of the change in the weather.

X-Q. 132. How long do you think it would have taken you, if you had not met the Underwriter, to get that bark into Provincetown? A. I couldn't have got her there.

X-Q. 133. Why not? A. Because the wind hauled out to the westward, right ahead.

X-Q. 134. What could you have done? A. I could have anchored her with a hawser.

X-Q. 135. Off Cape Cod? A. Yes, sir.

X-Q. 136. And waited? A. And waited and telegraphed the company. They have got signals. We could telegraph for a boat.

X-Q. 137. If you had turned her over to the Underwriter, if you, for instance, had gone on board of her, and then the schooner had gone back to where you found her off the Georges, how long would it have taken to do that? A. At that time?

X-Q. 138. Yes. A. Well, I would not have left the boat, and let her go down off the Georges at that time.

X-Q. 139. Why not? A. Suppose anything happened to the bark, who was going to take me off?

×-*Q.* 140. But there were two or three of you on board, you said? *A.* I said there was two of us on board.

×-*Q.* 141. Yourself and Connors? *A.* Yes.

×-*Q.* 142. Now, suppose you had got on board the bark, and come up to Boston, with the Underwriter, and sent the schooner to the Georges, how long would it have taken her to get there? *A.* Well, I don't know. The wind was squally and variable that night. I couldn't give much of an idea about that. Probably from eighteen to twenty hours, more or less.

×-*Q.* 143. What! Longer than you say it would have taken you to go back after you got to Boston? *A.* What?

×-*Q.* 144. I understand you to say it would have taken you twelve hours from Boston? *A.* Probably it would. It was blowing a gale of wind from the northwest.

×-*Q.* 145. Do you mean it would have taken you longer from Cape Cod? *A.* It would not have taken much longer. Recollect this was the evening before.

Direct Examination resumed by Mr. DODGE.

Q. 146. Mr. Hughes, when you were on board the Eliza Lines, did you, at any time, see any sails which had been stowed away? *A.* Yes.

Q. 147. Please to say what you saw, and where they were. *A.* They were down in the lazaret, in the forward end of the poop.

Q. 148. Do you remember what day this was, or about what time after your arrival in Boston? *A.* I think this was on Saturday morning.

Q. 149. Saturday morning, after you had arrived on Thursday? *A.* Yes.

Q. 150. Did you see those sails pulled out? *A.* Pulled them out, but didn't open them.

Q. 151. How many of them were there? *A.* Twenty-seven.

Q. 152. Have you come on from Brooklyn to testify in this case? *A.* Yes, sir.

Cross Examination by Mr. LOWELL.

×-*Q.* 153. Were you there when Mr. Whidden came down? *A.* Sir?

×-*Q.* 154. Were you there when Mr. Whidden came? *A.* Yes, sir.

×-*Q.* 155. To estimate and survey the vessel, were those sails shown to him? *A.* Not at that time.

×-*Q.* 156. What day was that, do you remember? *A.* I think it was Saturday, Saturday morning.

EVIDENCE FOR CLAIMANT OF BARK ELIZA LINES.

EXAMINATION OF ANDREW G. WHIDDEN.

Direct Examination by Mr. LOWELL.

Q. 1. There is a question between us, Capt. Whidden, whether, in making your estimate of the value of the Eliza Lines, you included a lot of sails that were down in the lazaret, or somewhere, spare sails. That is all that is left between us to decide here, whether there was an estimate made of the spare sails. *A.* Well, I was sent there to make, to place a value, as near as I could come at it, with the vessel as she was, full of water, of everything in, on and around the vessel. And I done so, to the best of my judgment, at that time, taking into consideration her condition. The first time I made a survey of the vessel, I couldn't get into the cabin. The vessel was down by the head. She had some, say, fourteen feet in the hold forward, and some nine feet in the pump. [*Survey and appraisal offered in evidence and marked "Exhibit A".*]

Q. 2. Well, that, I suppose, was on the twentieth? This is dated the twentieth of September, 1889. *A.* Yes, sir.

Q. 3. Afterwards, you had a better opportunity to examine her? *A.* Yes, sir.

Q. 4. And you wrote this: "We further say" [*reading from statement as far as the words, "we are justified in reducing our former valuation to* $2,250".] Now, I say, the only question between us is, whether you took in all the sails that there were there? *A.* Yes, sir; it is supposed that we took everything that there was there. And the object of dropping the value, the vessel to be

taken out, she had got to be pumped, the water got out of her somehow, at great expense, and the vessel discharged, a wharf hired, and the vessel discharged; taking into consideration stevedores' charges and everything, — under those circumstances we reduced the value. We thought we placed a high value upon what there was left there, from the very fact that I did not consider at that time anything there of any value, nothing more than what she would bring for junk.

Q. 5. But you think you must have seen all there was? *A.* About all; yes, sir.

Cross Examination by Mr. DODGE.

×-*Q.* 6. Mr. Whidden, you went on there to make your examination in conformity with this letter from the Consul: "You are hereby requested to proceed on board the derelict bark Eliza Lines at Lewis Wharf, recently towed in here, and after a careful examination and survey of hull and remaining spars, report to this vice-consulate, in writing, her present condition, and what, in your opinion, it will cost to have the vessel put into thorough seaworthy condition; also an appraisement of vessel in her present damaged condition." That was the letter, in conformity with which you made your survey? *A.* Yes, sir.

×-*Q.* 7. Now, I understand you, that you made your examination, and first reported her value at three thousand dollars? *A.* Yes, sir.

×-*Q.* 8. Now, please state what examination of the sails you made when you made this report. *A.* We did not make any examination of the sails on the first report, only what information I got from the captain.

×-*Q.* 9. Didn't you see the sails at all? *A.* No, sir; nothing more. I did see a pile of them, but nothing to tell much about it.

×-*Q.* 10. You did not overhaul them? *A.* Did not overhaul them.

×-*Q.* 11. Simply jumped at it? *A.* Took the captain's word for it.

×-*Q.* 12. Now, your second survey caused you to change your idea of the value somewhat? *A.* Yes, sir.

×-*Q.* 13. And you reported as the value $2,250? *A.* Yes, sir.

×-*Q.* 14. When you made that report, had you made any examination of the sails at that time? *A.* I saw the sails, didn't overhaul them. I saw them. I saw they were all old sails that had been patched.

×-*Q.* 15. You never unrolled them? *A.* No, sir; never.

×-*Q.* 16. Did you intend to include the value of those sails in that $2,250? *A.* Yes, sir; I think I did. That is what we were sent there for.

EXHIBIT A.

[Copy]

Boston, Sept. 20, 1889.

Vice-Consulate of Sweden and Norway,
To Messrs. A. G. Whidden, *Marine Surveyor.*
L. Fredriksen, *Ship Master.*
A. J. Sweetland, *Ship Carpenter.*

You are hereby requested to proceed on board the derelict bark Eliza Lines, at Lewis Wharf, recently towed in here, and after a careful examination and survey of hull and remaining spars, report to this Vice-Consulate, in writing, her present condition, and what in your opinion it will cost to have vessel put in a thorough seaworthy condition. Also an appraisement of vessel in her present damaged condition.

Respectfully,
(Sgd) G. LOOTZ,
V. Consul.

Boston, Sept. 20, 1889.

In accordance with accompanying order for survey, on Norwegian Bark Eliza Lines, derelict, Capt. Andreasen (Ex Br. Bark Lady Hulse) issued by the Swedish and Norwegian Vice-Consul at this port, we, the undersigned, this day held survey on said bark, now lying at Lewis Wharf, Boston, for the purpose of ascertaining her damage, and for estimating her cash value in her damaged condition, for settlement of salvage, and to make up estimate of repairs, the said bark having been dismasted in the late hurricane of Sept. 9, 1889, and abandoned and picked up Sept. 16, 1889, by the New York Pilot Boat, Edward E. Barrett, and towed to Boston from the south side of Nantucket Island. We find on examination, all spars gone to the deck, except mizzenmast gaff and boom, bowsprit and jibboom, all sails standing and running rigging, blocks, top ironwork gone, hawser about used up, about enough lines left to make her fast to wharf, gallows frames and iron stanchions and signal light

frames twisted and broken. Monkey boards, stanchions and rail on starboard side gone from poop deck, aft to bow some eighty feet, starboard main rail broken in two places, and about sixty feet of rail guard broken, several pieces of main bulwarks gone and some broken, some lower dead eyes and chain plates twisted and broken, deck steps, harness casks and deck water casks broken and gone, large boat gone and small boat smashed on forward house, rudder head shaky and split, head band and tiller band loose, top finish about decks more or less chafed up, part of grating over wheel gear and chain purchase gone and broken. Vessel appears tight as she now lies, loaded, shows some strain about top work, shear fairly good some two feet by the head, caused mostly, we think, by deck load washing forward; we find several sails below, spare, equal, we think, to half new suit; using our best judgment in making up estimate for repairs, after consulting other master mechanics in regard to price and cost, we submit the following statement:

All carpenters' work, joiners' work, calking work, including top, sides and decks, including new rudder stock, furnishing all materials, stock and labor, including metal for rudder	$1,300 00
Cost of spars, tops, trestletrees and all oak work for spars feds bolted complete delivered to ship . .	984 00
All top iron work and hull iron wanted	750 00
Block bill complete, delivered to ship	550 00
All wire rope, hemp rope, including fittings and rigging, bark complete	2,188 00
We judge on finding many spare sails on board, that it will take ⅜ of a new suit at a cost of . . .	1,020 00
Two new boats, with fittings complete	140 00
Deck steps and water and harness casks . . .	70 00
Discharging deck load, towage and wharfage on deck load	110 00
Sundries for galley, fittings and other small articles wanted about decks and houses	100 00
	$7,212 00

We also further state that after a careful examination of the hull of said vessel, taking in consideration her damaged condition, also her age, flag, being a small carrier for her tonnage, requires a large amount of ballast in changing ports; now for the appraisal cash value of the said hull, according to the best of our judgment, is ($3,000) three thousand dollars, U. S. Currency.

(Signed) A. G. WHIDDEN, *Marine Surveyor.*
A. I. SWEETLAND, *Shipwright.*
L. FREDRIKSEN,
Master Norwegian Bark Argentina.

BOSTON, Sept. 25, 1889.

We, the undersigned surveyors, on further examination of the hull of Norwegian bark Eliza Lines, find a large body of water in vessel, sounded in well-room, found nine feet seven inches, and as the vessel is two and one-half feet by the head, would give her twelve feet of water forward. We think most of the water ran in through scuttle hatch by main pumps companion way, forward mainmast combings, mast being broken on deck, although there was some water went down under, and on ends of poop bulkhead, as she strained and opened them. Diver reported bottom in fair condition, metal chafed off under keel, and on bilges will require some fifty sheets metal to patch, which will require vessel to be dry docked: the poop bulkhead will have to be refastened and top work strengthened by through treenails at an estimated cost of treenailing top work, $350 00

Towage, dry dock & repairing metal,	160 00
Refastening poop bulkhead,	125 00
Former estimate of repairs on hull,	1,300 00
	$1,935 00

We further say, in order to dry dock the vessel with safety would require to be pumped out, and a portion of cargo discharged, which would entail a large expense in addition to the above. Now having learned the nearly exact present condition of her hull, we think we are justified in reducing our former appraisal valuation to ($2,250) twenty-two hundred and fifty dollars, United States Currency.

(Signed) A. G. WHIDDEN, *Marine Surveyor.*
A. I. SWEETLAND, *Shipwright.*
L. FREDRIKSEN, *Norwegian Bark Argentina.*

Underskrifterne attesteres.
(Signed) G. LOOTZ,
[SEAL] *V. Consul.*

BOSTON, March 14, 1890.

To whom it may concern:

I hereby certify that the appraised value made of the derelict Norwegian bark, Eliza Lines, Capt. Andreasen, on Sept. 25, 1889, in her wrecked condition, being the last appraisal of twenty-two hundred and fifty dollars, $2,250, included everything on board of her at that time, all old sails and rigging; as I was called upon, in company with others on survey, to place a value of what there was in, on and about the wreck. Any statement that I may have made contrary to

the above, since holding survey, is a misunderstanding on my part, as I certainly never intended it should be understood any ways different from the above, or previous appraisal.

A. G. WHIDDEN,
Marine Surveyor.

Acknowledged and signed before me,

GJERT LOOTZ,
V. Consul.

[SEAL]

DECREE AS TO SALVAGE.

On the sixteenth day of January, A. D. 1891, after a full hearing of the cause upon the facts proved and arguments of counsel and mature deliberation thereon had, It was ordered, adjudged and decreed by the Court that the said libellant recover against the said bark Eliza Lines and cargo, the sum of seventeen hundred and fifty-five dollars salvage (of which amount three hundred and fifty dollars are for expenses incurred by salvors, and remainder for salvage services), and costs of suit taxed at three hundred and thirteen and six one-hundredths dollars, to be apportioned *pro rata*, on vessel, freight and cargo.

On the twenty-fourth day of January, A. D. 1891, the following claim of appeal by libellant was filed in court, viz:

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

WILLIAM W. BLACK

v.

BARK ELIZA LINES, CARGO AND FREIGHT.

And now comes the libellant and, a final decree having been made and entered in said cause, appeals from said decree, and also from the several interlocutory orders and decrees heretofore made in said cause, and prays that his said appeal may be allowed.

By his Proctor,

EDWARD S. DODGE.

And thereupon said appeal was allowed by the Court.

On said twenty-fourth day of January, A. D. 1891, the following claim of appeal by claimant of vessel and cargo was filed in court, viz.:

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

WILLIAM W. BLACK

v.

BARK ELIZA LINES, CARGO AND FREIGHT.

And now comes Hans Andreasen, claimant of the bark Eliza Lines, and her cargo, and, a final decree having been made and entered in said cause, appeals from said decree, and also from the several interlocutory orders and decrees heretofore made in said cause, and prays that his said appeal may be allowed.

By his Proctor,

JOHN LOWELL.

And thereupon said appeal was allowed by the Court.

FINAL DECREE.

From said December Term, A. D. 1890, this libel was continued to this present term. And now, on this thirteenth day of May, 1891, this cause having been heard on the pleadings and proofs and arguments of counsel, and mature deliberation thereon had, the Court doth order, adjudge and decree, that, whereas the net proceeds arising from the sale of the cargo of said bark Eliza Lines, and now in the registry of this court in this case, amount to $910.74, and whereas this Court did on Jan. 16, 1891, order, adjudge and decree, in the suit of Hans Andreasen *v.* 295,000 Feet of Lumber *et al.*, pending in this court, that said libellant, Andreasen, be awarded the sum of $1,450, as *pro rata* freight for the carriage of said cargo of said bark Eliza Lines, to be paid only from the proceeds aforesaid

of said cargo in the registry of this court; now, therefore, and inasmuch as said sum of $1,450 exceeds said sum of $910.74, the said sum of $910.74 is to be considered as wholly applied to the satisfaction of said sum of $1,450, *pro rata* freight, subject, however, to the lien of the salvor, libellant in this cause; and it is further ordered, adjudged and decreed that inasmuch as the proceeds of said cargo are thereby exhausted, the sums of $1,755 heretofore awarded to said Black, libellant in this suit, for salvage services and expenses, and $313.06 heretofore awarded said Black for costs of court, are to be apportioned *pro rata* upon said bark Eliza Lines, at a valuation of $2,250, and said freight amounting to $910.74; that is to say, that said Black recover for salvage services and expenses, against said bark Eliza Lines, $1,249.32, and against said freight $505.68, and that he recover for costs of court, against said bark Eliza Lines, $222.85, and against said freight, $90.21.

On the fourteenth day of May, A. D. 1891, the following claim of appeal by libellant was filed in court, viz:

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

WILLIAM W. BLACK

v.

BARK ELIZA LINES, CARGO AND FREIGHT.

And now comes the libellant, and a final decree having been made and entered in said cause, appeals from said decree, and also from each and all of the several interlocutory orders and decrees, heretofore made in said cause, and prays that his said appeal may be allowed.

By his Proctor,

EDWARD S. DODGE.

And therepon said appeal is allowed by the Court.

On the fourteenth day of May, A. D. 1891, the following claim of appeal by Hans Andreasen, claimant of vessel and cargo, was filed in court, viz.:

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

WILLIAM W. BLACK *v.* BARK ELIZA LINES, CARGO AND FREIGHT.

And now comes Hans Andreasen, claimant of the bark Eliza Lines, and her cargo, and a final decree having been made and entered in said cause, appeals from said decree, and also from each and all of the several interlocutory orders and decrees, heretofore made in said cause, and prays that his said appeal may be allowed.

By his Proctor,

JOHN LOWELL.

And thereupon said appeal is allowed by the Court.

I, Benjamin H. Bradlee, Deputy Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a transcript of the record of said cause in said court made up pursuant to Admiralty Rule 52.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court this eleventh day of April, A. D. 1892.

[SEAL]

BENJ. H. BRADLEE,
Deputy Clerk.

The following is the opinion of the Court in pursuance of which the decree entered Nov. 16, 1889, ordering a sale of the cargo, was entered, viz:

THE ELIZA LINES AND CARGO.

OPINION OF DISTRICT COURT.

Nov. 16, 1889.

NELSON, J. Upon the facts stated at the hearing I am of opinion that the ship having been abandoned at sea by the master and crew,

without any intention to retake possession, the cargo owner has a right to treat the contract of affreightment as at an end, and that the only remaining interest of the ship owner in the cargo is a claim for *pro rata* freight, and for any general average contribution that may hereafter appear.

The application of the cargo owner for a sale of the cargo is allowed and a sale ordered.

PROCEEDINGS IN CIRCUIT COURT.

No. 3545.

WILLIAM W. BLACK, LIBELLANT, APPELLANT,

v.

HANS ANDREASEN, CLAIMANT OF VESSEL, CARGO AND FREIGHT,

AND

BRADFORD DARRACH, ALSO CLAIMANT OF CARGO.

MOTION OF WILLIAM BLACK, LIBELLANT, APPELLANT.

[FILED MARCH 22, 1892; ALLOWED (COLT, J.) MARCH 24, 1892.]

And now comes William W. Black, libellant and appellant in the case above-named, and moves that the Court will order the notes made by the Judge of the District Court of the testimony of Charles West and Hans Andreasen, at the hearing in said District Court, on Oct. 18, 1889, upon the motion of Hans Andreasen to bond the cargo of the bark Eliza Lines, and upon the motion of Bradford Darrach, in behalf of James E. Ward *et al.*, for the sale of said cargo, and upon the libel of said James E. Ward *et al.* against said cargo, for the possession thereof, to be incorporated in the record of the District Court in this case, and to be made part thereof.

EDWARD S. DODGE,
Attorney and Proctor for
WILLIAM W. BLACK,
Libellant and Appellant.

No. 3545.

MOTION OF HANS ANDREASEN, CLAIMANT.

[FILED MARCH 22, 1892; ALLOWED (COLT, J.) MARCH 24, 1892.]

And now comes Hans Andreasen, claimant of vessel, cargo and freight in the case above named, and moves that the Court will order the notes made by the Judge of the District Court of the testimony of Charles West and Hans Andreasen, at the hearing in said District Court, on Oct. 18, 1889, upon the motion of Hans Andreasen to bond the cargo of the bark Eliza Lines, and upon the motion of Bradford Darrach, in behalf of James E. Ward *et al.*, for the sale of said cargo, and upon the libel of said James E. Ward *et al.*, against said cargo, for the possession thereof, to be incorporated in the record of the District Court in this case, and to be made part thereof.

JOHN LOWELL (*by* EDWARD S. DODGE),
Attorney and Proctor for
HANS ANDREASEN,
Claimant of Vessel, Cargo and Freight.

No. 3546.

HANS ANDREASEN, CLAIMANT, APPELLANT,

v.

WILLIAM W. BLACK, LIBELLANT,

AND

BRADFORD DARRACH, CLAIMANT OF CARGO.

MOTION OF WILLIAM BLACK, LIBELLANT.

[FILED MARCH 22, 1892; ALLOWED (COLT, J.) MARCH 24, 1892.]

And now comes William W. Black, libellant in the case above named, and moves that the Court will order the notes made by the Judge of the District Court of the testimony of Charles West and Hans Andreasen, at the hearing in said District Court, on Oct. 18, 1889, upon the motion of Hans Andreasen to bond the cargo of the bark Eliza Lines, and upon the motion of Bradford Darrach, in behalf of James E. Ward *et al.*, for the sale of said cargo, and

upon the libel of said James E. Ward *et al.*, against said cargo, for the possession thereof, to be incorporated in the record of the District Court in this case, and to be made part thereof.

EDWARD S. DODGE,
Attorney and Proctor for WILLIAM W. BLACK, *Libellant.*

No. 3546.

MOTION OF HANS ANDREASEN, CLAIMANT, APPELLANT.

[FILED MARCH 22, 1892; ALLOWED (COLT, J.) MARCH 24, 1892.]

And now comes Hans Andreasen, claimant and appellant in the case above named, and moves that the Court will order the notes made by the Judge of the District Court of the testimony of Charles West and Hans Andreasen, at the hearing in said District Court, on Oct. 18, 1889, upon the motion of Hans Andreasen to bond the cargo of the bark Eliza Lines, and upon the motion of Bradford Darrach, in behalf of James E. Ward *et al.*, for the sale of said cargo, and upon the libel of said James E. Ward *et al.*, against said cargo, for the possession thereof, to be incorporated in the record of the District Court in this case, and to be made part thereof.

JOHN LOWELL,
Attorney and Proctor for
HANS ANDREASEN, *Claimant and Appellant.*

NOTES OF JUDGE OF DISTRICT COURT.

[FILED APRIL 6, 1892.]

The ELIZA LINES. OCT. 18, 1889.

Mr. DODGE, *for Libellants and Salvors.*
Judge LOWELL, *for the Master.*
DABNEY and CUNNINGHAM, *for the Owner of the Cargo.*

CHARLES WEST.

I am a surveyor of lumber. I examined this cargo of the bark Eliza Lines. One third of it is wet and somewhat discolored. The rest of it is in perfect order. The actual damage to the cargo, for ordinary use, is small. This damage would not be increased by the cargo being reloaded and carried on to its destination. It is now under cover, piled up in a warehouse.

Cross Examination.

This cargo of the bark Eliza Lines is hard pine lumber. It is sawed into different sizes. There are ten or twelve different sizes. White pine and spruce would be damaged by going into a vessel when damp. This cargo would not. The discoloration would not increase on a voyage. The sizes into which the cargo is sawed are not suited to this market. The stained lumber would not bring so large a price as if it were not discolored.

Re-direct Examination.

A hard pine cargo is sometimes put right into the vessel wet.

HANS ANDREASEN.

I am the master of the bark Eliza Lines. The statements in the protest are true. We were obliged to cut away two masts, — the foremast and the mainmast. We would have sunk otherwise. After getting here from Nova Scotia, I tried to enforce my rights as master; went on board the ship and was ordered ashore by the keeper put in by the salvors. I went on board once or twice to get clothing and effects. The mates and our steward came with me from Nova Scotia. We had on board all our clothing. My sea charts and chronometer were on board. When I left the Eliza Lines I never expected to see her again. I and my mates were on board when the marshal took possession.

Cross Examination.

The cargo was loaded at Pensacola from the railway cars. We arrived here Saturday evening, and went on board the Eliza Lines the next Monday. Before the marshal came on board we had not slept in the ship, but had been to her after clothing. The keeper was walking the deck. I went down into the cabin by permission of the keeper.

Re-direct Examination.

The ship was not in a condition to be slept in. The mates have slept on board; I have not; the mates have slept on board a week now.

[*Bill of Lading put in; also the abandonment.*]

I, Thomas L. Nelson, Judge of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing evidence of Charles West and Hans Andreasen is a correct transcript of the notes made by myself of the testimony of said witnesses, at the hearing before me, on Oct. 18, 1889, upon the motion of Hans Andreasen to bond the cargo of the Eliza Lines, and upon the motion of Bradford Darrach, in behalf of James E. Ward *et al.*, for the sale of said cargo, and upon the libel of James E. Ward *et al.*, against said cargo for the possession thereof. No testimony was produced before me, at said hearing, excepting the testimony of said West and said Andreasen.

THOS. L. NELSON,
District Judge.

THE ELIZA LINES.

Nos. 3545, 3546, 3547, 3548.

EVIDENCE IN CIRCUIT COURT.

BOSTON, June 21, 1892.

Present: EDWARD S. DODGE, Esq., *for* WILLIAM W. BLACK.
JOHN LOWELL, Esq., *for* HANS ANDREASEN.
FREDERIC CUNNINGHAM, Esq., *for* ATLANTIC MUTUAL INSURANCE COMPANY.

It is agreed that the testimony of the following witnesses, to wit, F. W. Gorham, Charles Hunt, Joseph P. Ellicott and G. Lootz, shall be taken in shorthand by J. C. Miller, stenographer, that caption, certificate and signature are waived, that said depositions may remain open and off file, and that said depositions may be used in each and all of the before-named actions.

FREDERIC CUNNINGHAM,
Proctor for THE ATLANTIC MUTUAL INSURANCE COMPANY.
EDWARD S. DODGE,
Proctor for WILLIAM W. BLACK.
JOHN LOWELL,
Proctor for HANS ANDREASEN.

DEPOSITION OF F. W. GORHAM.

Direct Examination by Mr. DODGE.

Q. 1. What is your name? *A.* F. W. Gorham.

Q. 2. How old are you? *A.* Fifty.

Q. 3. Where do you live? *A.* Bristol, Me.

Q. 4. What is your occupation? *A.* Following the sea.

Q. 5. How long have you followed the sea? *A.* Well, I have followed the sea about thirty-five years.

Q. 6. And during any part of that time have you been a master? *A.* Twenty-two years.

Q. 7. In the course of your experience as master have you had occasion to make a voyage, or voyages, from Pensacola, Fla., to Montevideo? *A.* Pensacola to Rio, I have been.

Q. 8. And where is Rio located, in reference to Montevideo? *A.* One is in about 23° south, and the other is about 35°.

Q. 9. Can you state what is the general course or voyage of a vessel bound from Pensacola, Fla., to Montevideo? *A.* Well, there are various courses. We generally have to come down out of the gulf, you know, and then we have to steer north. There are so many courses; you can look at the charts, and see that there are.

Q. 10. Can you describe, in general terms, the course that a vessel would take that was bound upon that voyage, from Pensacola, Fla., to Montevideo? *A.* Yes, with a chart I can. She would have to steer out southeast first. Then she would have to go north through the Straits of Florida. Then she would have to go to the northward and east; you see, from the Straits of Florida she would have to go about northeast until she got down past the Bermudas. Then her course is east, and from that it is south, and from that southwest.

Q. 11. All the way to South America? *A.* Yes, sir; all the way to South America.

Q. 12. About how far would she proceed northerly before she turned to go south? *A.* About 40° is our rule. We strike 40° and 40°.

Q. 13. You strike 40°? *A.* Yes.

Q. 14. And in what longitude? *A.* 40°, — 40° and 40°.

Q. 15. 40° and 40°? *A.* Yes, sir.

Q. 16. What is the average length of time for that voyage from Pensacola, Fla., to Montevideo? *A.* Well, it is about from eighty-five to ninety days. Some of these Norwegian and Italian vessels make it one hundred and twenty.

Q. 17. Supposing a vessel to have reached a point in 38° 37′ north latitude and 67° 24′ west longitude, what proportion, or about what proportion, of the voyage from Pensacola, Fla., to Boston, Mass., would she have accomplished? *A.* Well, over two thirds of the voyage.

Q. 18. Supposing her to be in the position which I have just stated, that is to say, 38° 37′ north latitude and 67° 24′ west longitude, whether or not she would be then substantially on the course that a vessel would pursue bound from Pensacola, Fla., to Montevideo. *A.* Yes, sir; she would.

Q. 19. About what proportion of the voyage from Pensacola, Fla., to Montevideo would she then have accomplished? *A.* Well, I should say about one third; that is, taking the difficulties of getting down through the Straits— that is the most difficult part.

Q. 20. I mean about what proportion in distance, not about what proportion in time. *A.* In distance? Let us see. Well, I should say about one third of her voyage.

Q. 21. Is there any one portion of that voyage that is more difficult than any other? *A.* Yes, sir; coming down through the Straits is the most difficult part.

Q. 22. Through what straits, do you mean? *A.* Why, the Straits of Florida. She has to get down through the Straits, and has to have so many different winds in that season of the year.

Q. 23. Supposing her to have reached the latitude and longitude which I have described, whether she would have performed the more or less difficult portion of her voyage? *A.* She would have performed the difficult part of it, as I look at it.

Cross Examination by Mr. CUNNINGHAM.

×-*Q.* 24. How many voyages from Pensacola to Rio have you made, captain? *A.* Two, sir.

X-*Q.* 25. And what cargoes did you carry? *A.* Pitch-pine.

X-*Q.* 26. Both times? *A.* Both times; yes, sir.

X-*Q.* 27. There is quite a market for pitch pine between Pensacola, Fla., and South America, is there not? *A.* Yes, sir.

X-*Q.* 28. There is a good deal more pitch-pine carried from Pensacola to South America than there is from Boston to South America, is there not? *A.* Yes, sir,— more pitch-pine — yes,, sir. There is scarcely any carried from Boston, I guess. It is all white pine.

X-*Q.* 29. Do you know anything about the relative sizes and lengths of the lumber that is destined for South America, as compared with that which is used in Boston? *A.* Well, no; because the times that I went I took all three-by-nine deal pitch-pine, and it ran from twenty feet down to fifteen. But then, they carry out bridge stuff, you know, now, lately, — big timber.

X-*Q.* 30. Have you ever made any voyages with pitch pine between Pensacola and Boston? *A.* Yes, sir, but not of timber. I have brought one cargo of pitch-pine from Pensacola to Boston, or from close by Pensacola.

X-*Q.* 31. You say, "not of timber": what was it? *A.* It was flooring boards that I brought.

X-*Q.* 32. By timber you mean large sticks? *A.* Large sticks, — twelve by twelve, or such as that. That is what we call timber.

X-*Q.* 33. And do you know whether or not there is any difference in the sizes of lumber generally which is destined for the South American market and that which is destined for the New England market? *A.* Well, it is a good deal the same way, the same sizes. That is, railroad stuff they have been sending down to South America of late years for bridges and building; a great deal of three-by-nine, such as I told you that I took down, — lots of that goes there.

X-*Q.* 34. Now, what kind of pine lumber is it that is shipped from Boston? *A.* To the river?

X-*Q.* 35. Yes. *A.* Generally, from Boston, it is white-pine boards and spruce scantling.

X-*Q.* 36. And a vessel can carry more white-pine lumber than she can pitch-pine, can she not? *A.* Yes, sir; a great deal more.

X-*Q.* 37. How much more, should you say? *A.* Well, my vessel

was 363 tons, — I mean 463. She would take 463 thousand feet of lumber from the East, where she wouldn't carry but 370 of pitch-pine. Generally calculate about two tons to a thousand, pitch-pine.

×-*Q.* 38. That is, she would carry about a quarter as much again white-pine? *A.* Yes, sir; white-pine as she would pitch.

×-*Q.* 39. So that if you wanted to ship 300,000 feet of pitch-pine lumber you would have to get a considerably larger vessel to carry it than if you wanted to carry 300,000 feet of white-pine lumber? *A.* Yes, sir.

×-*Q.* 40. And you would have to pay a correspondingly larger freight, would you not, for the pitch-pine than for the white-pine? *A.* Yes, sir.

Direct Examination resumed by Mr. DODGE.

Q. 41. You have stated, captain, that the position 38° 37′ north latitude and 67° 24′ west longitude is in the course from Pensacola, Fla., to Montevideo, South America; whether or not it is also in the course from Pensacola to Boston, Mass? *A.* Well, it is. That is, of course, we should be more in shore if we were bound to Boston; but a vessel, you know, starting for a point, say 30° and 40°, can't always keep in her position.

Q. 42. Until a vessel reached the South American coast, would there be any difference in the course of a vessel bound from Pensacola to Montevideo and a vessel bound from Pensacola to Rio? *A.* There would be no difference. The same course.

Q. 43. About how far down would the course continue the same, of vessels bound to those two points, Rio and Montevideo? *A.* Well, they wouldn't alter their course, bound to Rio, — well, they would be about sixty miles, — or say one hundred and twenty miles off of Rio.

Q. 44. And to go to Montevideo they simply have to proceed further along south? *A.* Yes, sir; further along south, keep right in to the coast.

Cross Examination resumed by Mr. CUNNINGHAM.

×-*Q.* 45. Did you give the average length of the voyage between Pensacola and Boston? *A.* No, sir; I did not.

×-*Q.* 46. Well, do you know what the average length of that

voyage is? *A.* No, sir; but I can soon give it to you right here on the chart.

X-*Q.* 47. I mean the length of time. *A.* Oh, the length of time? Oh, yes; it is about, — we generally calculate about twenty days, — that is a good voyage, — twenty days.

DEPOSITION OF CHARLES HUNT.

Direct Examination by Mr. DODGE.

Q. 1. What is your name? *A.* Charles Hunt.

Q. 2. How old are you? *A.* Fifty-one.

Q. 3. Where do you live? *A.* Newton.

Q. 4. What is your occupation? *A.* Ship broker.

Q. 5. In the course of your occupation as ship broker, had you, in the year 1889, occasion to charter any vessels for voyages from North American ports to South American ports, or to know of the rates at which vessels were chartered for such voyages in the market? *A.* I had.

Q. 6. What was the market rate of charter for vessels to carry lumber from Boston, Mass., to Montevideo, for orders to discharge at Montevideo or Buenos Ayres, in the fall of 1889, say the months of October, November and December, 1889? *A.* The rates were from $12 to $14.

Q. 7. What kind of lumber was at that time carried from Boston to those ports? *A.* Pine — white-pine.

Q. 8. Do you know of any cargoes of hard-pine shipped during those months from Boston to Montevideo or South American ports? *A.* I do not think I ever heard of any.

Q. 9. That is to say, if I understand you, it is not customary to ship hard-pine from this port? *A.* Not customary.

Q. 10. Do you know how the rates for carrying hard-pine would compare with the rates for carrying white-pine or spruce, or what is known as eastern lumber? *A.* They vary from $3.00 to $5.00 more for hard-pine.

Q. 11. At the time of the year which I have specified, that is to say, October, November and December, 1889, what, in your

opinion, would have been the charter rate for vessels to carry a cargo of hard-pine lumber, say two hundred and ninety-five thousand feet, from Boston to Montevideo, for orders to discharge at Montevideo or Buenos Ayres? *A.* Well, I should think it would be worth $4.00 a thousand more than for white-pine lumber at the least.

Q. 12. Have you had much experience in the shipping of hard-pine cargoes? *A.* A great deal. Probably more than any other broker.

Q. 13. And in Eastern lumber as well? *A.* Yes, sir.

Q. 14. You have stated you should think it would be worth $4.00 a thousand more for hard-pine lumber than for white-pine. *A.* I would modify that by saying, not for shipping hard-pine lumber from Boston, because I do not recall any experience in that matter.

Q. 15. Do you know of any one who has had any experience in that matter? *A.* No, I do not. It would only occur by reason of a wrecked cargo.

Q. 16. You say that you should think it would be worth $4.00 more than for white-pine cargo; will you please state how much per thousand you should think it would be worth at that time?

A. Could I make a figure a moment?

Q. 17. Certainly. *A.* Now, may I ask you to repeat the question?

[*The question was then read.*]

Q. 18. That is to say, what, in your opinion, would have been the market rate of freight for a hard-pine cargo of the size that I have specified, from Boston to Montevideo, for orders to discharge at Montevideo or Buenos Ayres? *A.* Well, I think it would have been worth, — it would be worth $4.00 a thousand more, provided you could get a vessel.

Q. 19. The rates you gave before were $12 and what? *A.* Twelve dollars to $14; $15 to $16 in the south; that is, from the southern ports to the river; and from Boston $12 to $14.

Q. 20. I mean, in your previous answer, — what you thought would be the rate on lumber from Boston. *A.* I said $12 to $14 for a cargo of white-pine. Now, I say I think for a cargo of hard-pine from here it would be worth $4.00 more a thousand for a cargo of hard-pine than for white-pine.

Q. 21. That is to say, $4.00 more than $12 or $14? *A.* Yes, sir; $4.00 more than $12.

Q. 22. That is to say, then, $16 you think would be the rate? *A.* Sixteen dollars.

Q. 23. Do you recollect which way the freight market was tending toward the close of the year 1889? *A.* Tending downward.

Q. 24. Do you know what difference there was, if any, between the freight rates in September, 1889, and December, 1889? *A.* No, I cannot recall that, but there was a very rapid fall.

Q. 25. Toward the end of the year? *A.* From September to the end of the year. The bottom sort of dropped out.

Q. 26. Did you testify to substantially this matter in the District Court in this case? *A.* I did.

Cross Examination by Mr. CUNNINGHAM.

×-*Q.* 27. You say, as I understand you, Mr. Hunt, that the going rate of freight for a cargo of white-pine lumber from Boston to the river in the latter part of September, 1889, was from $12 to $14 per thousand? *A.* That is what I said.

×-*Q.* 28. And that your idea of what a proper freight for a cargo of hard-pine lumber between the same places would be at that time was $4 a thousand more? *A.* It was.

×-*Q.* 29. That is from $16 to $18 per thousand? *A.* Yes.

×-*Q.* 30. And that the going rate of freight for a cargo of hard-pine lumber between Pensacola and the river at that time was from $15 to $16? *A.* Yes, sir.

×-*Q.* 31. Then, if I understand you rightly, the freight upon hard-pine lumber between Pensacola and the river at that time was less than the freight on a hard-pine cargo of lumber between Boston and the river; is that it? *A.* Well, it would probably have been so; and by reason of the competition that a hard-pine cargo would meet with here.

×-*Q.* 32. That is, it would have cost at that time from $16 to $18 to have got a cargo of hard-pine lumber carried from Boston to the river, and probably it would have cost from $15 to $16 to have got the same cargo carried from Pensacola to the river at that time? *A.* Yes, sir; that is my opinion.

×-*Q.* 33. Then, if you had had a cargo of pitch-pine lumber lying in Pensacola at that time, to be carried to Montevideo, you would not have considered that you had been much benefited if that cargo had been brought to Boston and you had had to ship it from there to the river, would you? *A.* Well, it would depend entirely on whether my friends wanted the cargo out in the river. It would depend entirely on whether they wanted the cargo.

×-*Q.* 34. Do you know anything about the relative sizes and lengths of pitch pine that is destined for South America and for New England? Is there any difference? *A.* Yes, there is. For New England consumption, do you mean?

×-*Q.* 35. Yes, sir. *A.* Oh, there is a great difference in these export cargoes from the coastwise cargoes.

×-*Q.* 36. Different sizes and lengths are shipped to South America from what are brought to New England? *A.* Oh, yes; entirely different sizes, entirely different schedules.

×-*Q.* 37. So that a cargo of the sizes and lengths destined for South America would not bring as much when sold in Boston as it would if it had been cut of the lengths used for consumption in Boston? *A.* I do not think it would be of any use here really, from what I hear.

×-*Q.* 38. It would sell for very much less, probably? *A.* Yes; I don't think they could do anything with it.

Direct Examination resumed by Mr. DODGE.

Q. 39. I understand you to testify, in answer to Mr. Cunningham on cross examination, that the rate of freight which you have stated, $12 to $14, from Boston to Montevideo, would have been, in your opinion, the rate in the latter part of September; what, in your opinion, would have been the rate in the months following, that is to say, October, November or December? *A.* Well, I think the rate would have been still lower.

Q. 40. Are you able to say how much lower? *A.* No, I am not.

Q. 41. Do you know what the rates of freight were upon hard-pine cargoes in February, 1889, from Pensacola, Fla., to Montevideo or Buenos Ayres? *A.* I do not recall them.

Q. 42. Are you able to state what would be the rate of freight

upon a hard-pine cargo, supposing there were one to go, from Boston to Montevideo or Buenos Ayres, in October, November or December, instead of the last of September, as Mr. Cunningham has asked you? *A.* What would have been the rate of freight?

Q. 43. Yes, sir. I understood you to say, in answer to his question, $16 to $18 the latter part of September. *A.* Yes. But I think, as the market grew weaker, the difference would be less. As the market grew weaker, orders were scarce, and the rate would fall naturally, would be cheaper.

Q. 44. And I understand you that the market weakened very rapidly in the latter part of that year? *A.* Weakened very rapidly.

Cross Examination resumed by Mr. CUNNINGHAM.

×-*Q.* 45. Was that equally so with regard to cargoes between Pensacola and the river as well as between Boston and the river? *A.* I do not think it was. That did not naturally follow; because we find it not so easy work to get those southern cargoes, — southern vessels rather; not southern cargoes, southern vessels.

×-*Q.* 46. But it is your opinion, is it not, that during October, November and December of that year it would have cost as much, if not more, to have chartered a vessel to carry hard-pine from Boston to the river as it would to have chartered a vessel to carry hard-pine from Pensacola to the river? *A.* I think it would have cost, — it would cost nearly as much. I said it might cost a little less, you know, as the market weakened, — my previous testimony was. It would cost nearly as much.

×-*Q.* 47. It would be pretty much the same thing, would it, between Boston and Pensacola; that is, between freights from Boston to the river, and from Pensacola to the river, it would be pretty much the same thing? *A.* On a cargo of hard-pine?

×-*Q.* 48. Yes, for a cargo of hard-pine. *A.* It would be nearly the same.

Direct Examination resumed by Mr. DODGE.

Q. 49. Is your business concerned mainly with foreign vessels or with domestic vessels? *A.* Mostly foreign.

Q. 50. Were you, in 1889, chartering any vessels to carry lumber from the southern gulf ports to the eastern ports? *A.* No.

Q. 51. And I understand you that you know of no instance of hard-pine lumber shipped from Boston to South American ports? *A.* Not any. I don't know of any instance.

Q. 52. Whether or not your answers concerning the relative prices of shipments of hard-pine lumber from Boston to South American ports are based upon actual knowledge of shipments actually made, or whether they are simply expressions of your opinion. *A.* Simply an expression of my opinion.

DEPOSITION OF JOSEPH P. ELLICOTT.

Direct Examination by Mr. DODGE.

Q. 1. What is your name? *A.* Joseph P. Ellicott.

Q. 2. Where do you live? *A.* Boston.

Q. 3. What is your business? *A.* Ship broker and commission merchant.

Q. 4. How long have you engaged in that business? *A.* Fifty years, nearly,— forty-nine years.

Q. 5. In the course of your business as ship broker have you had occasion to charter vessels for voyages from Pensacola, Fla, to Boston, Mass? *A.* Yes, sir; a great deal, oftentimes.

Q. 6. Can you state what the market rate of freight was for the carriage of hard-pine cargoes from Pensacola to Boston in the months of September and October, 1889? *A.* I looked it up. From $9.25 to $9.50. We made charters along between August and December, along there — $9.25 to $9.50.

Q. 7. Whether or not there was any considerable variation in the rate of freight for such cargoes from August to the end of the year? *A.* No, not much.

Q. 8. Whether or not there was any further variation than you have indicated, $9.25 to $9.50, in those months? *A.* I don't think it differed much from that. I can refer to my books and substantiate it if it is needed.

Q. 9. Can you state whether or not you testified in this same case in the United States District Court upon the previous trial? *A.* I have an indistinct recollection that I did. I don't know where it was, I don't recollect now, but I recollect about the case.

Cross Examination by Mr. CUNNINGHAM.

×-*Q.* 10. I suppose you have chartered a number of vessels to carry lumber from Boston, have you not, sir? *A.* From Boston?

×-*Q.* 11. From Boston. *A.* Where?

×-*Q.* 12. To different points. *A.* Well, not a great deal, no.

×-*Q.* 13. You have not chartered many lumber vessels? *A.* Not a great deal from Boston. We don't ship much lumber from Boston, except to South America.

×-*Q.* 14. And lumber that you ship from Boston is principally white-pine and spruce? *A.* White-pine and spruce, yes, sir.

×-*Q.* 15. A vessel will carry very much more white-pine than she will hard-pine, won't she? *A.* Well, that depends. If the cargoes are loaded down in the British Provinces or in the State of Maine, they will carry more than they will if it is Canadian pine. Canadian pine is sawed thicker.

×-*Q.* 16. But taking the same number of superficial feet, a vessel will carry considerably more white-pine than she will hard-pine, will she not? *A.* Yes, sir.

×-*Q.* 17. How much more white-pine will a vessel carry than hard-pine, quarter as much again? *A.* Oh, no; no, I don't think they will carry quarter, — well, I should think they would carry about a quarter as much again, — twenty-five per cent. more white-pine than hard-pine.

×-*Q.* 18. Do you know anything about the relative sizes and lengths of the lumber which is shipped from Pensacola to New England for consumption, and that which is shipped from Pensacola to South America for consumption? *A.* Do I know the difference in the sizes?

×-*Q.* 19. In the relative sizes and lengths; do they send the same sizes and lengths to this market as they do to South America? *A.* No, sir; they do not. My experience is, that the lumber sent to South America is what is called "deals", three and four inch stuff largely, and that is a character of lumber that is not a specialty at all in this market.

×-*Q.* 20. And it is true, is it not, that a cargo which was destined for South American ports would not bring as much in Boston as the

same number of feet which was destined for the Boston market and cut to suit it? *A.* I do not think it would.

Direct Examination resumed by Mr. DODGE.

Q. 21. What is the reason, Mr. Ellicott, that a vessel will carry more of white-pine or spruce cargo than of hard-pine cargo, as you have stated? *A.* It is lighter lumber.

DEPOSITION OF G. LOOTZ.

Direct Examination by Mr. DODGE.

Q. 1. What is your name? *A.* G. Lootz.

Q. 2. How old are you? *A.* Fifty-five.

Q. 3. Where do you live? *A.* Boston.

Q. 4. What is your occupation? *A.* Ship broker and commission merchant.

Q. 5. Are you a member of any firm of ship brokers and commission merchants? *A.* Gill & Lootz.

Q. 6. In the course of your business as ship brokers and commission merchants, have you had occasion to charter vessels for voyages from North American to South American ports with lumber? *A.* Yes, a great many times.

Q. 7. Do you know what was the market rate of freight for a vessel to carry lumber from Boston to Montevideo, for orders to discharge at Montevideo or Buenos Ayres, in the months of October, November and December, 1889? *A.* Current rates?

Q. 8. Current or market rates. *A.* About $12 to $13 a thousand feet,— a thousand superficial feet; that is, for white pine,— white-pine lumber.

Q. 9. Do you know whether the rates for carrying hard-pine lumber from Boston to Montevideo, for orders to discharge at Montevideo or Buenos Ayres, would be greater or less than the rates for carrying white-pine or spruce? *A.* Well, if there were any pitch-pine lumber to be shipped, which I never heard of, it would always be more; but we never ship any from here south.

Q. 10. Do you know how much more the rates would be, proportionally, for hard-pine than for soft-pine or spruce? *A.*

Well, I should say all the way from $3.00 to $5.00 per thousand. That is, did I understand you the rate if loaded in Boston?

Q. 11. If loaded in Boston. *A.* Yes, $3.00 to $5.00 Excuse me; that is a rather difficult question to answer. If you will allow me to explain; if a vessel carries pitch-pine she cannot carry a deck load, it is so heavy; consequently, a vessel, if she should take pitch-pine from here, must have more freight in order to make up the difference But I never heard of a pitch-pine cargo going from here.

Q. 12. But if I understand you, your testimony is, if there were such a cargo to go, the difference would be as you have stated? *A.* I should say it would be from $3.00 to $5.00 a thousand more, in order to make up the difference.

Q. 13. Do you know if there was any variation in the rates of lumber charters from the month of August to the month of December, 1889, inclusive? *A.* If I recollect right, I think there was a slight decline of about $1.00 to $1.50 between the summer months and the fall or late fall.

Q. 14. And which way did the decline run? *A.* Declined, — so much less per thousand. For instance, if in August it was $13 per thousand it would in November or December be $12 per thousand.

Q. 15. Did you have anything personally to do with the business of the bark Eliza Lines after she had been towed into this port by salvors, in September, 1889? *A.* Yes, we acted as her agents, — my firm did.

Q. 16. Did you have any official connection with her business, as the representative of any foreign nation? *A.* Simply to appoint the surveyors for the repairs.

Q. 17. She being a Norwegian vessel, and you the Norwegian consul? *A.* Being consul, I had to appoint surveyors to look after the damage.

Q. 18. Do you know when the repairs of the Eliza Lines were completed after she had been towed in here by the salvors, and when she was again ready to take on cargo and proceed to sea? *A.* Do I know when she was ready to proceed to sea?

Q. 19. Yes; or, rather, when her repairs were completed so she was ready to take on cargo. *A.* Well, she left some time in January, it must have been —

Q. 20. January, 1890? *A.* 1891. She arrived here in September, 1890.

Q. 21. No, it was 1889. *A.* Oh, 1889? Well, that is a long time back. Let me see, — well, she must have been about ready to proceed to sea in January, 1890, — some time in January, or the first of February, 1890.

Q. 22. Do you know when her repairs were completed so that she was ready to take on cargo? *A.* About January, 1890, — the latter part of January, I think. Of course I can tell better by referring to my books.

Q. 23. I will ask you to refresh your memory with that, if you know anything about it [*handing paper to witness*]. *A.* You see, this is a long time back. This here [*referring to paper*] decides that.

Q. 24. You can only refresh your memory with it. *A.* It must have been in December — that is, December, 1889.

Q. 25. That she was ready to take on cargo? *A.* Ready to take on cargo. [*The witness then retired for the purpose of referring to his books.*] On referring to my books, I find that I issued the first survey Sept. 20. Then I issued the order for the last survey Dec. 12, — for the final survey; and I paid that bill Dec. 16, — $35. But here is my greatest guide; when the ship was all ready for business we chartered her for new business here, and that charter party is dated Dec. 12, 1889.

Q. 26. What is your answer, then, to my question as to the date when the Eliza Lines was ready to take on cargo after her repairs? *A.* Dec. 12, 1889.

Q. 27. State whether or not you testified as to the rates of freight from Boston to Montevideo, in the District Court upon the trial of this case there. *A.* I did, yes.

Cross Examination by Mr. CUNNINGHAM.

×-*Q* 28. You were the agent of the Eliza Lines in Boston upon her arrival here in September, 1889, were you not? *A.* Yes.

×-*Q.* 29. Your firm was? *A.* The firm of Gill & Lootz.

×-*Q.* 30. And she arrived in Boston on the 19th of September, 1889, did she not? *A.* I think she did.

×-*Q.* 31. And when she arrived in Boston she was in charge of

the New York pilots, who saved her and brought her in? *A.* That is quite right, yes.

×-*Q.* 32. And they appointed a watchman to take charge of her when they went off to New York and left her, did they not? *A.* I am very sure they did; yes, when they left with the pilot boat.

×-*Q.* 33. And up to the time of their leaving her she was in their charge? *A.* Yes.

×-*Q.* 34. Up to the time of their leaving to go to New York? *A.* Yes, sir.

×-*Q.* 35. You did not undertake to take possession of her in the name of the owners, or anything of that sort? *A.* Not at all.

×-*Q.* 36. And the master was not in Boston when she arrived, was he? *A.* No, the master was then in Yarmouth, Nova Scotia.

×-*Q.* 37. And arrived in Boston some days afterwards? *A.* Yes, about four or five days afterwards.

×-*Q.* 38. And when he arrived in Boston the vessel was still in charge of the watchman appointed by the pilots, was she not? *A.* I think she was in charge of the pilots themselves when he arrived here, — I am quite sure she was.

×-*Q.* 39. After his arrival in Boston did the master come to you and make any complaints about not being allowed to go aboard the vessel?

[*Question objected to by* Mr. DODGE *as not cross examination of anything opened upon direct examination.*]

A. I think I remember he did.

×-*Q.* 40. You were then the Norwegian consul?

[*Objected to as above.*]

A. I was.

×-*Q.* 41. Do you know the name of the watchman who was appointed by the salvors?

[*Objected to as above.*]

A. I do not.

×-*Q.* 42. Was it Thomas Dolan?

[*Objected to as above.*]

A. I do not have the slightest recollection.

×-*Q.* 43. Do you know where he is now?

[*Objected to as above.*]

A. I do not.

×-*Q.* 44. Have you ever sought him out or seen him with regard to giving his testimony in this case?

[*Objected to as above.*]

A. Never; I don't know him, — that is, I don't remember him. Did you say Thomas Dolan?

×-*Q.* 45. Thomas Dolan, yes, sir; that was the name. What did you do when the master came to you and made this complaint?

[*Objected to as above.*]

A. I think I told him I would see the pilots and arrange that he could go on board if he wanted to for some particular reason.

×-*Q.* 46. And did you see the pilots about that?

[*Objected to as above.*]

A. I did see the pilots.

×-*Q.* 47. And arranged that he should be allowed to go on board?

[*Objected to as above.*]

A. I did, — to go on board, in his cabin, to look after some things that belonged to him.

×-*Q.* 48. To get his clothes?

[*Objected to as above.*]

A. I think that was it, — to get his clothes, yes.

×-*Q.* 49. But you made no arrangement about his taking charge of the vessel, or anything of that sort?

[*Objected to as above.*]

A. Not at all.

×-*Q.* 50. And, so far as you know, the pilots, or their watchman, were in charge of the vessel when the suit for salvage was brought?

[*Objected to as above, and also for the reason that it is a question of law.*]

A. I think they were, yes.

×-*Q.* 51. Were you present at the time of the sale of this cargo?

[*Objected to as not cross examination of anything opened upon direct examination.*]

A. I was not.

×-*Q.* 52. Do you know what it brought?

[*Objected to as above.*]

A. I think, — I have got down to "I think" in this whole thing here, — I think it brought about $1,800.

×-*Q.* 53. Well, it went very low, did it not?

[*Objected to as above.*]

A. Very low indeed.

×-*Q.* 54. Do you know why?

[*Objected to as above.*]

A. Well, I think I have an impression why. It was just after a very heavy fire up at the southern part of the city here, and there were only two or three bidders on the wharf at the time of the auction.

×-*Q.* 55. Was it not because the sizes and lengths of the lumber were not suited to this market?

[*Objected to as above.*]

A. I do not think the sizes were very well suited for this market, but I think the fact that there were so few bidders had more effect upon the price than the sizes had.

×-*Q.* 56. You have given the going rates of freight for cargoes of white-pine lumber from Boston to Montevideo in the fall of 1889, and you think that it was about $12 to $13 per thousand? *A.* I do.

×-*Q.* 57. You think it was about from $12 to $13 for one thousand feet? *A.* $12 to $13. In fact, I know it was, because we chartered a vessel at that time at that rate.

×-*Q.* 58. Do you know anything about the going rates of freight from Pensacola to Montevideo for a cargo of lumber at that time? *A.* At that time the freights were from $19 to $20 per thousand from Pensacola or from the Gulf of Mexico to Buenos Ayres.

×-*Q.* 59. Upon a cargo of hard-pine lumber? *A.* There is nothing but hard-pine shipped from there, — it is all hard-pine.

×-*Q.* 60. This lumber was cut up for the South American market, was it not? *A.* So I was told; yes, sir.

×-*Q.* 61. Of your personal knowledge, you do not know? *A.* I do not know. I am not in the lumber business.

×-*Q.* 62. But you think that fact may have had something to do with the low price it brought in Boston? *A.* Well, I have answered that I think it may have had something to do with it, but not as much as the fact there were so few bidders.

×-*Q.* 63. There is much more hard-pine lumber shipped from Pensacola to South America than from Boston, is there not? *A.* Why, there is none shipped from Boston, to my knowledge, none whatever.

×-*Q.* 64. Then there is a great deal more, is there not, from Pensacola? *A.* Yes, that is true; yes, sir. We can't ship it from here, because we get it from the south up here. And I will further say, that, to my knowledge, I do not know of any. I never heard of it.

×-*Q.* 65. And a cargo of hard-pine cut in the sizes and lengths for the South American market would be worth more in Pensacola than it would be in Boston, would it not? *A.* Well, I should judge it would be. I am not a lumber merchant. I think it would.

×-*Q.* 66. You say that hard-pine lumber is not carried on deck as a general rule? *A.* Very few vessels can carry it on deck, because they get so deep in the water. There are exceptions now and then, but very few.

×-*Q.* 67. And for that reason you would have to get a larger vessel to carry the same amount of hard-pine than you would to carry white-pine, would you not? *A.* Yes. It requires more space to carry it.

×-*Q.* 68. Yes, and a larger vessel to carry the same number of superficial feet? *A.* Yes, sir; that is right.

EVIDENCE FOR ATLANTIC MUTUAL INSURANCE CO.

In No. 3,545.

DEPOSITION OF WILLIAM H. T. HUGHES.

Taken in the city of New York, N. Y., June 30, 1892, under commission issued from the Circuit Court, June 29, 1892, upon interrogatories filed in behalf of the Atlantic Mutual Insurance Company, claimant of cargo, and cross interrogatories filed in behalf of William W. Black, libellant, and Hans Andreasen, claimant of vessel, cargo and freight, before

EDWARD LE. PATTERSON, *Commissioner.*

Direct Interrogatories by Mr. DABNEY *and* Mr. CUNNINGHAM, *for the* ATLANTIC MUTUAL INSURANCE COMPANY.

Q. 1. What is your name, age, residence, and occupation? *A.* William H. T. Hughes; forty-five; 10 West 53d Street, New York City; merchant.

Q. 2. Of what firm are you now a member, and were you a member of the same firm during the whole of the months of August and September, 1889? *A.* James E. Ward & Company; I was then.

Q. 3. Please state whether the said firm made a shipment of a cargo of lumber on the bark Eliza Lines at Pensacola for a voyage thence to Montevideo or Buenos Ayres on or about the eighth day of August, 1889. *A.* Yes.

Q. 4. If you shall say that such firm did make such shipment, please state who were the owner or owners of said cargo of lumber when shipped, and whether the same person, persons or firm continued to be the owner or owners of said cargo of lumber from the date of its shipment up to and including the nineteenth day of September, 1889. *A.* James E. Ward & Company were the owners; they continued to be the owners.

Q. 5. Please examine the bill of lading hereto annexed, and state who Thomas Drysdale & Company are, whether you are familiar with the signature of Thomas Drysdale & Company, and if yes, state how you became so, and state whether the signature on the back of said bill of lading purporting to be that of Thomas Drysdale & Company is genuine. *A.* Thomas Drysdale & Company are a firm of merchants doing business in the city of Buenos Ayres, South America; I am familiar with the signature of Thomas Drysdale & Company; I became so from constantly seeing it; I believe it to be genuine.

Q. 6. If you shall say in answer to Question 3 that said firm did make a shipment of lumber from Pensacola to Montevideo in the month of August, 1889, please state whether the bill of lading hereto annexed is the bill of lading given for said cargo of lumber, and if yes, whether, up to Sept. 19, 1889, Messrs. Thomas Drysdale & Company had made any advances to the firm of James E. Ward & Com-

pany named therein, upon said bill of lading, or had in any way acquired any interest therein, or any property in said cargo of lumber, and if yes, what interest they had acquired. *A.* It is the bill of lading for that cargo of lumber; Messrs. Thomas Drysdale & Company had made no advances up to that date on that cargo, nor had they acquired any interest therein.

Q. 7. Please state whether or not said cargo was abandoned to the Atlantic Mutual Insurance Company, and if yes, by whom, and give the date of said abandonment, and state whether, up to the time of said abandonment, any persons other than the said James E. Ward & Company, mentioned in said bill of lading had acquired any interest or property in said cargo of lumber, or whether at the time of said abandonment the property in said cargo of lumber was and remained in the said James E. Ward & Company. *A.* It was abandoned to the Atlantic Mutual Insurance Company; I do not remember whether by myself or my partner, nor do I remember the date, but on the twenty-sixth of November, 1889, the Atlantic Mutual Insurance Company paid James E. Ward & Company a total loss on the cargo; it did so remain.

[*Edward S. Dodge, counsel for Black, libellant and appellant aforesaid, and John Lowell, for Andreasen, claimant of vessel, cargo and freight, object to and protest against the issuing of this commission to take the deposition of William H. T. Hughes, for the cause that no reason appears why the testimony of said Hughes was not taken in the District Court; and said counsel hereby give notice to counsel for Darrach and others, claimant of cargo, appellee, that upon the return of said commission and filing of said deposition they will move the Court to order said deposition suppressed. And counsel for Black and for Andreasen aforesaid object to the interrogatories propounded to said Hughes as incompetent, irrelevant and immaterial, and generally, and further object to the right of the Atlantic Mutual Insurance Company to become, in any sense, a party to this litigation aforesaid, or to take part in the trial of the cases above named.*

And not waiving their above objections, but insisting thereon, counsel for Black, libellant and appellant, and counsel for Andreasen, claimant of vessel, cargo and freight, propound the following cross-interrogatories to said witness, de bene esse.]

Cross examination, de bene esse.

X-*Q.* 8. What was the quantity and quality, and what were the sizes, of the cargo of lumber shipped at Pensacola, Fla., by the firm of James E. Ward & Company, on the bark Eliza Lines? *A.* The cargo was two hundred and ninety-four thousand five hundred and and thirty-four feet, — superficial feet, — board measure, of pitch-pine. I do not remember the sizes.

X-*Q.* 9. From whom was said cargo purchased, and what was the value of said cargo at the port of shipment? *A.* I cannot tell without referring to my books.

X-*Q.* 10. What amount was paid by the firm of James E. Ward & Company for said cargo, and when was said sum paid? *A.* I cannot tell without referring to my books.

X-*Q.* 11. If you have testified that said cargo was at any time abandoned to the Atlantic Mutual Insurance Company by the firm of James E. Ward & Company, state particularly upon what day and at what hour of the day said abandonment was made? *A.* I do not remember.

X-*Q.* 12. Did said Atlantic Mutual Insurance Company ever accept said abandonment? If yes, state particularly upon what day and at what hour of the day said company accepted that abandonment? *A.* They paid a total loss, and therefore must have accepted it; I do not remember the date.

X-*Q.* 13. If you say that said Atlantic Mutual Insurance Company accepted said abandonment, and if said acceptance was in writing, annex a copy of said acceptance to this answer. *A.* I do not remember whether it was in writing or not.

X-*Q.* 14. Did said Atlantic Mutual Insurance Company ever pay said James E. Ward & Company for a loss of said cargo of the bark Eliza Lines, if yes, when was said payment made, and what was the amount paid as for said loss? *A.* The Atlantic Mutual Insurance Company did pay James E. Ward & Company for a loss of said cargo, on Nov. 26, 1889, $4,560.

X-*Q.* 15. If you have testified that said cargo was at any time abandoned to the Atlantic Mutual Insurance company by the firm of

James E. Ward & Company, state in what office or place said abandonment was made. *A.* I am sure I do not remember.

×-*Q.* 16. Do you know of any facts or circumstances connected with the making of said abandonment, or with the payment for the loss of said cargo, that indicate or tend to indicate why said abandonment was made, or said payment was made upon the day upon which, or at the time at which, you have testified that said abandonment or payment was made, rather than earlier, or later, if yes, state said facts or circumstances fully. *A.* I do not remember any of the details at all.

×-*Q.* 17. Have you any knowledge, and, if yes, state fully what knowledge you have, of any communications, in writing or otherwise, between said James E. Ward & Company or any member or employee of said firm, and said Atlantic Mutual Insurance Company or any agent or employee of said company, or between said James E. Ward & Company, or any member or employee of said firm, or said Atlantic Mutual Insurance Company or any agent or employee of said company, and any other person or persons, in reference to the making of said abandonment, or the payment of said loss, or in relation to the acceptance of said abandonment, or the payment of said loss, at the particular time at which you have testified that said abandonment or said payment was made? State particularly the exact time at which said communications if any, were made or received. *A.* I cannot answer the question from memory.

×-*Q.* 18. Annex to your deposition all such communications inquired about in the preceding cross question as were in writing, or produce before the magistrate who takes your deposition copies of all such communications, and cause said copies to be attested by said magistrate and annexed to your deposition, and state whether you have done so. *A.* I do not believe we have any communications of the kind.

×-*Q.* 19. Is it not the fact that said abandonment was made or said loss was paid at the particular time at which said abandonment was made or said loss was paid, in consequence of information received by said Ward & Company, or by said Atlantic Mutual Insurance Company, either or both, or by the agents of either or both, to the effect that suit or legal process of some kind was about

to be brought in Boston against said Ward & Company, to compel them to pay freight upon said cargo of said bark Eliza Lines, or in consequence of other information received from Boston regarding said freight? *A.* I know nothing about it, because I did not have charge of the business.

X-*Q.* 20. If you have answered the preceding cross question affirmatively, state fully what the information was, and from whom it was received, and when it was received, and in what manner. *A.* I cannot answer this, not knowing anything about the matter.

X-*Q.* 21. Annex to your deposition any communications received by the firm of James E. Ward & Company, or any member, agent or employee of said firm, from Lewis S. Dabney, Esq., or Frederic Cunningham, Esq., from the sixteenth day of November to the thirtieth day of November, 1889, inclusive, in any way relating to the making, or acceptance, of said abandonment, or to the payment of said loss. *A.* I do not know anything about any such communications.

X-*Q.* 22. Have you heard, seen or been informed of the foregoing questions or cross questions, or any of them, or of the substance of any of them, previous to said questions or cross questions being put to you by the magistrate? If yes, of which of them have you been so informed, and by whom? *A.* I have not been informed of any of them.

WILLIAM H. T. HUGHES.

[MEMORANDUM. The bill of lading annexed to and referred to in the deposition of William H. T. Hughes is the same as the bill of lading printed on page 37 of this record, except that this bill of lading is signed "H. Andreasen", and is indorsed "Thomas Drysdale & Co.", and is not here reprinted. JOHN G. STETSON, *Clerk.*]

No. 3545.

WILLIAM W. BLACK, *Libellant*,

v.

THE ELIZA LINES, CARGO AND PENDING FREIGHT MONEY.

No. 3546.

HANS ANDREASEN, *Claimant and Appellant*,

v.

WILLIAM W. BLACK, *Libellant*.

BOSTON, Nov. 2, 1892.

Appearances: EDWARD S. DODGE, *for* BLACK, *Libellant;*
L. S. DABNEY *and* FREDERICK CUNNINGHAM, *for claimant of cargo;*
JOHN LOWELL, *for claimant of vessel and cargo.*

John Lowell, for Andreasen, claimant of vessel, cargo and freight, and Edward S. Dodge, counsel for Black, object to and protest against the taking of these depositions for the cause that no reason appears why the testimony of said Madden and said Cunningham was not taken in the District Court; and said counsel hereby give notice to counsel for claimant of cargo that they shall move the Court to order said depositions suppressed.

DEPOSITION OF JOHN J. MADDEN.

JOHN J. MADDEN, being first duly sworn, deposes and says as follows: —

Q. 1 (*by* Mr. CUNNINGHAM). Your full name is John J. Madden? *A.* Yes, sir.

Q. 2. And you live in Cambridge? *A.* Yes, sir.

Q. 3. What is your business? *A.* Salesman, lumber business.

Q. 4. And with what house are you connected? *A.* Cunningham, Banks & Company.

Q. 5. In Boston? A. In Boston.

Q. 6. How long have you been in that business? A. Eighteen years, nearly.

Q. 7. With the same house? A. No; with three houses in Boston.

Q. 8. Did your firm have anything to do with the cargo of lumber brought into Boston by the bark Eliza Lines in the fall of 1889? A. Yes, sir. The time I wouldn't swear to as I haven't gone into any minutes to look it up in any way.

Q. 9. That cargo you had to do with? A. Yes, we handled part of it.

Q. 10. Did you buy part of it? A. Yes, sir.

Q. 11. How much did you buy? A. One third.

Q. 12. Now, will you state whether that cargo was in the sizes and lengths ordinarily brought to Boston for the Boston market? A. It was not.

Q. 13. What sizes and lengths was it? A. I couldn't say as to the lengths. The sizes in general were not what we would want in this market at any price.

Q. 14. And have you had any difficulty in getting rid of it? [*Objected to as irrelevant and immaterial.*] A. We have some of it on hand now.

Q. 15. And did the rest of it meet with a ready sale? A. It did not.

Q. 16. And for what reason? A. It was undesirable.

Q. 17. Why was it undesirable? A. The size was such that they couldn't be used for nothing but in such sizes as spruce and Eastern lumber could be used.

Q. 18. Do you know anything about the lumber business in Pensacola? A. I have bought considerable lumber at Pensacola.

Q. 19. Do you know whether there is a South American market for hard pine lumber at Pensacola? A. There has been one.

Q. 20. And do you know whether there was in the autumn of 1889? A. I believe there was.

Q. 21. And were these such sizes and lengths as would have suited the South American market? A. Yes.

Q. 22. What should you say as to the relative value of a cargo

of lumber like that in Pensacola and Boston; would it be worth more in Pensacola or in Boston? *A.* I should say it would be worth more, a trifle more, at Pensacola.

Q. 23. And do you know anything about the relative rates of charter parties from Pensacola to Montevideo, and from Boston to Montevideo? *A.* The difference would be but very little, perhaps fifty cents to a dollar,— not a great deal.

Q. 24. For a cargo of hard pine lumber? *A.* Not a great deal. Hard pine lumber is never shipped from Boston to those ports, so there is no way of comparing; the only way would be to compare the Eastern, or white pine, from Boston to Pensacola, or to Montevideo; and then compare from Pensacola to Montevideo; in that way, why, we could get at some idea of what the relative rates would be.

Q. 25. And you say that you think they are about the same, or fifty cents to a dollar difference? *A.* About the same; I don't know definitely, but I should say about the same.

Cross examination, de bene esse.

×-*Q.* 26 (*by* Mr. DODGE). Do I understand, Mr. Madden, that you are a member of the firm of Cunningham & Banks? *A.* No, sir; salesman, purchasing agent and manager, and general utility man.

×-*Q.* 27. It was the firm of Cunningham & Banks that bought this third of the cargo of the Eliza Lines, was it not? *A.* Yes, sir.

×-*Q.* 28. Will you state in general terms how the sizes of that cargo differed from the sizes that you are accustomed to put upon the Boston market? *A.* Well, the sizes I haven't as a whole fresh before me; but taking them in a general way there were such sizes as one by three, two by three, three by four, I believe, — and this is to the best of my recollection, you know; I may vary some of the sizes, — three by six, three by nine, and other sizes that we never have call for in that grade of stock for this market. When we do have call for those sizes, we use Eastern lumber, spruce.

×-*Q.* 29. Was it such stuff as would be suitable for the building of houses? *A.* Yes.

X-*Q.* 30. Wasn't it probable that that was the purpose for which it was intended for use in South America, — in houses? *A.* Yes.

X-*Q.* 31. And for that purpose it was well adapted? *A.* For the South American trade.

X-*Q.* 32. Who purchased the cargo of the Eliza Lines from the United States marshal? *A.* George McQuesten & Co., I think.

X-*Q.* 33. And did you buy from George McQuesten & Co., or did you enter into an agreement beforehand with McQuesten & Co., that they were to buy the cargo and that you were to take a portion of it afterwards? *A.* I did not.

X-*Q.* 34. I mean when I speak of you, the firm of Cunningham & Banks. *A.* It may have been some such an arrangement.

X-*Q.* 35. It was some such an arrangement, was it not? *A.* I have heard it was some such an arrangement.

X-*Q.* 36. Did any firms in Boston besides George McQuesten & Co., and Cunningham & Banks take any portion of that cargo? *A.* Yes; P. S. Huckins & Co.

X-*Q.* 37. And do you know whether or not P. S. Huckins & Co. were also parties to the arrangement that McQuesten was to buy it in and the rest of you were to share? *A.* I don't know as to that.

X-*Q.* 38. Have you no information about it? *A.* None positive.

X-*Q.* 39. I will ask for your impression upon that suggestion upon such information as you have. *A.* Well, my impression would be that there was.

X-*Q.* 40. Is it not the fact that the firm of Cunningham & Banks, and George McQuesten & Co., and P. S. Huckins & Co., constitute all the parties in Boston who are engaged in dealing in hard pine lumber? *A.* No, sir.

X-*Q.* 41. Is it not the fact that they are the principal firms in Boston who are engaged in dealing in hard pine lumber? *A.* No, sir.

X-*Q.* 42. What other firms are there? *A.* Wellman, Hall & Co., William Haskins & Son, James & Abbot, three very large concerns.

X-*Q.* 43. And of those concerns which of them, speaking in

general terms, are most largely engaged in the trade of hard pine lumber? *A.* Of the three that I mentioned?

×-*Q.* 44. Of the six that are now mentioned, the three that you mentioned and the three that contributed to buy this cargo of the Eliza Lines? A. Well, I don't know as I understand your question really.

×-*Q.* 45. What firm in Boston should you say was most extensively engaged in the dealing in hard pine lumber? *A.* Wellman, Hall & Co.

×-*Q.* 46. And what firm next? *A.* I should say George McQuesten & Co.

×-*Q.* 47. And next to that, who? *A.* Cunningham, Banks & Co.

×-*Q.* 48. And next to that ? *A.* William Haskins & Son.

×-*Q* 49. And who after that? *A.* Well, it would be James & Abbot, and Huckins, I don't know just how they would stand really, but in a general way.

×-*Q.* 50. You have testified in relation to the charter rates from Pensacola and from Boston to South America. It is unheard of, is it not, that a cargo of hard pine lumber is shipped from Boston to South America? *A.* Yes, sir.

×-*Q.* 51. And all answers relating to such shipments are purely theoretical? *A.* To get at the comparative value of the charter party?

×-*Q.* 52. Exactly. *A.* Of course that would be theory altogether.

×-*Q,* 53. Have you had experience personally in making charters from Pensacola to South America? *A.* No, sir.

×-*Q.* 54. Has your firm made any such charters? *A.* No, sir.

×-*Q.* 55. Upon what knowledge then do you speak of charters from Pensacola to South America? *A.* The general knowledge of reports that we get.

×-*Q.* 56. But you yourself neither personally nor as engaged in the business with the firm of Cunningham & Banks have any actual experience in that matter? *A.* No, sir.

×-*Q.* 57. Do you know what at the time, or just preceding the time, that you purchased this cargo of the Eliza Lines was the going

rate of a charter party from Pensacola to Boston on hard pine lumber? *A.* I think about nine dollars. I looked that up before I came out, — nine and one eighth.

×-*Q.* 58. You speak of such a cargo as this being worth more in Pensacola than in Boston. What knowledge have you of the Pensacola market for hard pine lumber? *A.* I have bought lumber myself for Cunningham, Banks & Co., at Pensacola, and being there, of course, am familiar more or less with the wants of the general market.

×-*Q.* 59. Did you buy any lumber at Pensacola at the time that you bought this cargo from the Eliza Lines, or previous to that time, within a month or two? *A.* I think we bought in November of that year; that was after.

×-*Q.* 60. And how long before you purchased this cargo of the Eliza Lines was it that you previously had any dealings in hard pine in the Pensacola market? *A.* Well, we had been shipping during that year steadily almost from that market.

×-*Q.* 61. Do I understand you correctly that in your opinion the difference in charter party from Pensacola to South America, and from Boston to South America for a hard pine cargo, providing that a hard pine cargo was to be shipped from Boston, would be fifty cents to a dollar? *A.* There wouldn't be very little difference.

×-*Q.* 62. Do you mean that it would be fifty cents to a dollar greater from Pensacola to South America than from Boston? *A.* From Boston to the river would be greater than it would be from Pensacola to the river.

×-*Q.* 63. Which is the longer distance? *A.* Boston.

×-*Q.* 64. Boston to the river is further than from Pensacola to the river? *A.* Yes, sir; I should say so, that is from the map; I have no other way of knowing.

×-*Q.* 65. And it is upon that theory or understanding that you base your testimony? *A.* Yes, sir.

×-*Q.* 66. If I understand you, the difficulty with the cargo of the Eliza Lines was that it was cut in lengths unsuitable for this market. *A.* In sizes.

×-*Q.* 67. What portion of the the third of the cargo which you bought have you disposed of? *A.* That I couldn't say, really.

×-*Q.* 68. Can you say what prices you obtained for what you have disposed of? *A.* No, I could not.

×-*Q.* 69. Do you mean that you bought a third of three hundred thousand feet of lumber when you say you bought a third of the cargo?

A. A third of what that survey was.

×-*Q.* 70. Of that quantity? *A.* Of that quantity surveyed.

×-*Q.* 71. Do you know how much the firm of Cunningham & Banks gave for it? *A.* In dollars and cents?

×-*Q.* 72. In dollars and cents. *A.* I couldn't tell you without referring to our books; I could in that way.

×-*Q.* 73. Did they pay a third of the price which was given to the marshal for it? Do you know if you gave one third of the price that was given to the United States Marshal for it? *A.* I think we did.

×-*Q.* 74. As nearly as you can, state at what rate you have sold the quantity that you have already sold of that cargo of the Eliza Lines. *A.* I couldn't give you anything definite for the reason that our stock all goes into bulk or merchandise account; and in selling, we wouldn't know whether it was from the Eliza Lines or from what cargo it was from.

×-*Q.* 75. Do you mean to say then that it is impossible to ascertain now at what rate you have sold the portion of the cargo of the Eliza Lines which you have sold? *A.* Yes, sir; practically so.

×-*Q.* 76. Was the cargo in good condition? *A.* No, sir.

×-*Q.* 77. In what condition was it defective? *A.* It had been, as you know, exposed to the sea and weather for a long time, which made it a little undesirable; and then, again, in the manner in which it was put out, the stock was badly handled in being discharged from the vessel, I think, and thrown in bulk regardless, so it was very much damaged in that way.

×-*Q.* 78. Do you mean that it was all very much damaged, or that some portion of it was damaged? *A.* Portions of it.

×-*Q.* 79. Portions of it were entirely undamaged? *A.* Portions of it, yes, sir.

It is agreed that notice, caption, certificate and signature are waived, and the stenographer's fees may be taxed as costs.

WALTER ROGERS, *Notary Public.*

STIPULATION AS TO STATEMENTS OF COUNSEL TO BE REGARDED AS EVIDENCE.

It is agreed in the above entitled cases that Frederic Cunningham, if called as a witness, would testify as follows: —

That he is thirty-eight years old, lives in Brookline, Mass., and is a lawyer, and one of the proctors for the owners of cargo in the above entitled cases; and a few days before the filing of the libel in No. 3545 for salvage, he saw the libellant Black and Mr. Darrach in Mr. L. S. Dabney's office, Mr. Dabney being there; and some conversation was had with one of them as spokesman about the matters referred to in the libel filed afterwards; and that it was stated to him, the deponent, in the presence and hearing of the persons above named, that the owner of the cargo and the owner of the vessel each had given notice to Black that he demanded the cargo and forbade him to deliver it to the other parties; deponent is unable to say who the speaker was, but is of the impression that it was Mr. Darrach or Mr. Dabney and not Mr. Black, who was the speaker; Mr. Dabney told Mr. Black that the only way for him out of the difficulty was to file a libel for salvage, and let the Court decide who was entitled to the possession of the cargo; that Black and Darrach and Mr. Dabney were the persons present during this conversation besides the deponent; that Mr. Darrach said that he had brought Black up to Mr. Dabney's office to find out what he could do or what he ought to do under the circumstances; that during the conversation it was stated that the vessel owners or the captain in behalf of the vessel owners, or somebody else in their behalf (deponent is unable to say which), were demanding the cargo of the salvors.

That the deponent afterward filed the claim that was filed by Darrach in behalf of James E. Ward & Co., after the libel for salvage was filed; and that before filing that claim the deponent went to Mr. Edward S. Dodge's office on the 26th September, 1889, in the afternoon, probably between two and four o'clock, knowing that he was going to file a libel for salvage, and told him that Mr. Dabney

and he, in behalf of the cargo owners, were going to file a claim the cargo, and wanted to know when his libel was to be filed that purpose; that Mr. Dodge was then at work on the libel, told the deponent that he did not expect to get it prepared in to file that afternoon before the closing of the clerk's office at o'clock, but that he should probably file it the first thing the next ing; that at that time, they, Messrs. Dabney and Cunningham, were ready to file the claim; that the first thing the next morning deponent went down to the clerk's office of the District Court, see if the libel had been filed, and as he got to the elevator at bottom, the elevator came down, and Mr. Edward S. Dodge out; and he told the deponent then that he had filed his libel afternoon before, and had just filed a claim in behalf of the ves owners for the cargo; and the deponent then went right off and Mr. Darrach and came down and filed the claim, on behalf of owners of the cargo, for the cargo.

It is further agreed by the parties in the above entitled cases t Edward S. Dodge, if called as a witness, would testify that, at t interview mentioned above in the statement by Mr. Cunningha he told Mr. Cunningham that he would let him know when the li of Black had been filed, and that he did not tell him that he wo let him know when the libel was to be filed; and that when he Mr. Cunningham at the elevator, as above stated, he was on his w to Mr. Cunningham's office to inform him that the libel had be filed, and that he then and there informed Mr. Cunningham that was on his way to his (Mr. Cunningham's) office to inform him the fact that the libel had been filed.

That Mr. Dodge would further testify that on Nov. 25, or ea in the forenoon of Nov. 26, 1889, he called at the office of Mr. L. Dabney, and notified Mr. Dabney that it was the intention John Lowell, Esq., proctor for owners and claimant of vessel a claimant of cargo, and of himself to file, upon Nov. 27, 1889, a to bring to the attention of the Court upon the same day the pe tion that freight money be paid into court (Record, pages 16, 1 and the libel of Hans Andreasen *v.* 295,000 feet of lumber a Bradford Darrach *et al.* (No. 3548).

That Mr. L. S. Dabney, if called as a witness, would testify that had no recollection of any such notice.

It is hereby agreed that the above statements of what Mr. Cunningham, Mr. Dodge and Mr. Dabney, respectively, would testify, called as witnesses, may be printed in the Record, and treated as the same force and effect as depositions

L. S. DABNEY, *and*
F. CUNNINGHAM,
Proctors for Claimant of cargo.
JOHN LOWELL,
for Claimant of vessel and cargo.
EDWARD S. DODGE,
for BLACK, *Libellant.*

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

CARGO EX THE ELIZA LINES.

No. 3547.

HANS ANDREASEN,

CLAIMANT, APPELLANT,

v.

JAMES E. WARD ET AL.,

LIBELLANTS, APPELLEES.

RECORD.

JOHN LOWELL,
for Claimant, Appellant.

LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
for Libellants, Appellees.

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.
1892.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

CARGO EX THE ELIZA LINES.

No. 3547.

HANS ANDREASEN,

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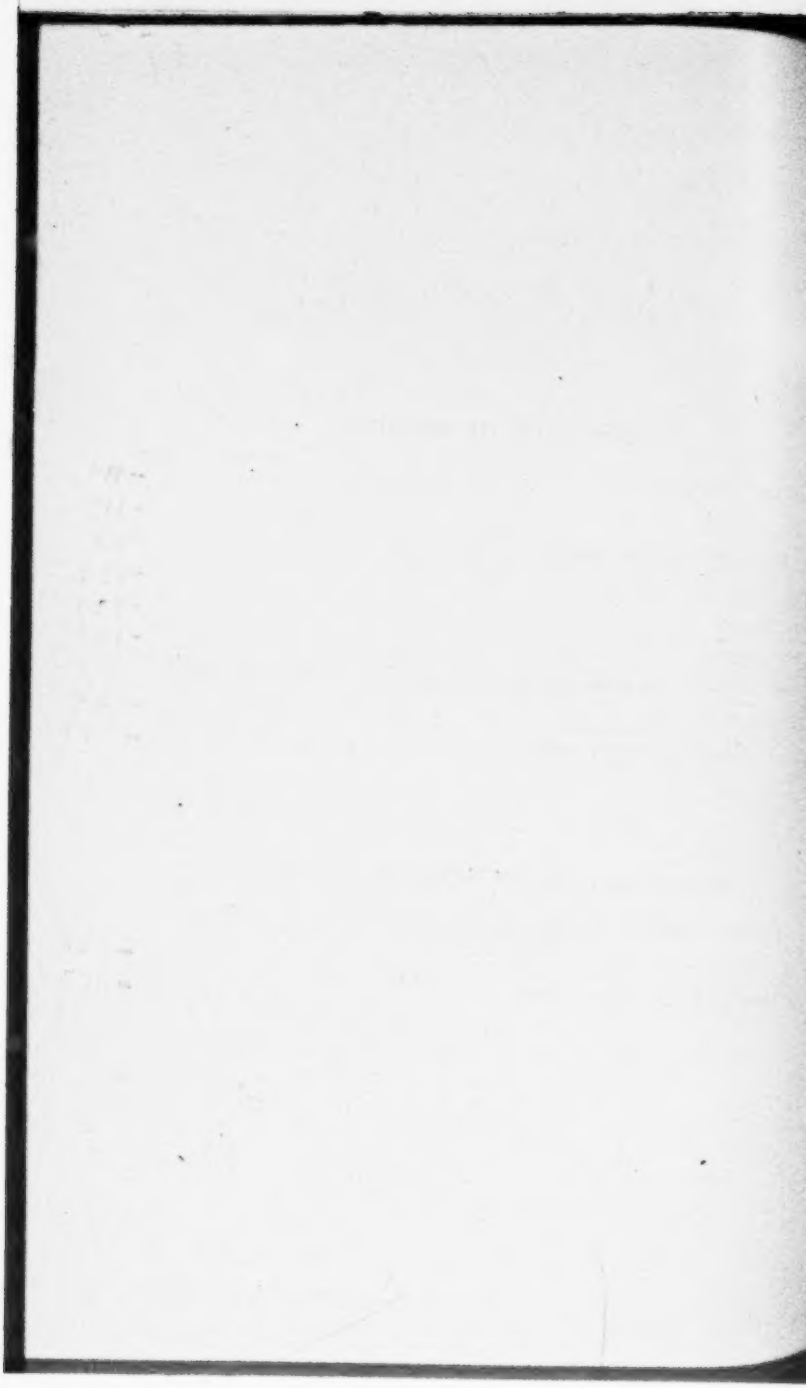

DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

CARGO EX THE ELIZA LINES.

JAMES E. WARD ET AL., *Libellants,*
v.
HANS ANDREASEN, *Claimant, Respondent.*

TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

At the District Court of the United States, begun and holden at Boston, within and for the District of Massachusetts, on the first Tuesday (being the second day), of December, in the year of our Lord, one thousand eight hundred and ninety.

Before
THE HONORABLE THOMAS L. NELSON,
Judge.

JAMES E. WARD ET AL., *Libellants,*
v.
295,000 FEET OF LUMBER, CARGO EX THE ELIZA LINES.

This libel was filed in court on the eighteenth day of October, A. D. 1889, and is as follows, viz:

LIBEL.

To the Honorable THOMAS L. NELSON, *Judge of the District Court of the United States of America, within and for the District of Massachusetts:*

The libel of James E. Ward, Henry P. Booth, and William H. T. Hughes, merchants and co-partners, doing business in New York,

in the county and State of New York, under the firm name and style of James E. Ward & Company, against the cargo of pitch pine lumber lately laden on board of the Norwegian bark Eliza Lines, and against all persons lawfully intervening for their interest therein, in a cause of possession, civil and maritime, alleges as follows: —

First. That heretofore, while the said vessel was lying in the port of Pensacola, in the State of Florida, the libellants caused to be shipped on board of said vessel, the said cargo of pitch pine lumber, to be carried thence to the port of Montevideo, and the master of said vessel signed the usual bills of lading, whereby he undertook to carry said cargo from Pensacola to said port of Montevideo, and there deliver it to the libellants, or their assigns, on payment of the freight therein stipulated.

Second. That the said vessel sailed from Pensacola upon the voyage aforesaid, with said cargo on board, and was abandoned, deserted, and left derelict with her cargo upon the high seas, by her master and crew, without any hope or expectation of being able to return to her, or of being able to complete her said voyage.

Third. That said vessel was afterwards fallen in with by certain persons, and brought with her cargo in safety into the port of Boston, in said district, and libelled by said salvors for salvage, under process issued from this Honorable Court.

Fourth. That said vessel and cargo are now in the custody of this Honorable Court, and the said cargo has been unladen.

Fifth. That the said libellants are ready and willing and hereby offer to pay whatever sum this court shall award as salvage upon said goods, and wish to reclaim said goods, and to take possession of the same, at said port of Boston, but the master of said vessel, upon which said goods were laden, claims that he is entitled to the possession of the same, and to carry them to said port of Montevideo, upon payment of the salvage aforesaid.

Sixth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

Wherefore the libellants pray that process in due form of law, according to the course of this Honorable Court, in causes of admiralty and maritime jurisdiction, may issue against said cargo of pitch pine

lumber, and that all persons having any interest therein may be cited to appear and answer, on oath, all the matters aforesaid, and that said merchandise may be delivered to the libellants, and that the said libellants may recover their expenses and costs in the premises, and that they have such other and further belief in the premises as law and justice may require.

JAMES E. WARD,
HENRY P. BOOTH,
WILLIAM H. T. HUGHES,
by BRADFORD DARRACH.

OCTOBER 18, 1889.

Sworn to by said Darrach, before me,
[SEAL] ELISHA BASSETT, *Notary Public.*

On the twenty-ninth day of November, A.D. 1889, the following claim was filed in court, viz:

CLAIM.

And now comes Hans Andreasen, of Farsund, in the Kingdom of Norway, and, on oath, says, that he is the master of said bark, and was master of her, and in possession of her, and of her cargo of pitch pine lumber, at the time that said bark and said cargo were arrested by the U. S. Marshal for said District of Massachusetts (in whose custody said cargo still is), upon the libel of William W. Black, now pending in this court; that he is the lawful bailee of said cargo, and is the only person entitled to the possession thereof.

Wherefore he prays that said cargo be delivered to him, upon giving said stipulations with sureties, in such sums as the court shall direct.

HANS ANDREASEN.

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

BOSTON, Nov. 29, 1889.

Subscribed and sworn to, before me,
[SEAL] ALBERT E. LEACH, *Notary Public.*

On the twenty ninth day of November, A. D. 1889, the following answer was filed in court, viz:

ANSWER.

To the Honorable THOMAS L. NELSON, *Judge of the District Court of the United States within and for the District of Massachusetts:*

The answer of Hans Andreasen, of Farsund, in the Kingdom of Norway, master of the Norwegian bark, Eliza Lines, of said Farsund, and claimant of said cargo of pitch pine lumber, lately laden on board of said bark Eliza Lines, to the libel of James E. Ward, Henry P. Booth and William H. T. Hughes, co-partners, doing business in New York, in the State of New York, under the firm name and style of James E. Ward & Co., against said cargo.

And thereupon said claimant, answering said libel, alleges and articulately propounds as follows: —

First. That he admits the allegations of the first article of said libel, excepting the allegation that he undertook to deliver said cargo to the libellants or their assigns; which allegation he denies, and alleges on the contrary, that by the terms of said bills of lading, he agreed and contracted to carry said cargo to Montevideo, in the province of Uruguay, South America, and to deliver said cargo to Messrs. Thomas Drysdale & Co., or to their assigns, at said Montevideo, or at Buenos Ayres, at whichever place he might, upon arrival at said Montevideo, be ordered to deliver it, upon payment of freight thereon, by said consignees.

Second. He admits that said bark sailed from Pensacola bound for said Montevideo with said cargo, and alleges that while on said voyage, on Sept. 7, 1889, said bark encountered a violent storm and heavy sea which continued with increasing violence throughout Sept. 8 and 9, causing said bark to labor heavily, to take in water, and to roll and list heavily to starboard, so that, on Monday, Sept. 9, 1889, it became necessary, in order to prevent said bark from capsizing, to cut away her foremast and her mainmast, which was accordingly done to save said bark and said cargo from destruction, and which was successful in so saving said bark and said cargo. That by reason of the loss of said masts, and by reason of other

damage, which said bark had suffered from perils of the sea during the storm aforesaid, the claimant, master of said bark together with the other officers and the crew of said bark were compelled to leave her, and were taken on board another vessel on Sept. 11, 1889, and carried to Port Maitland, in the Province of Nova Scotia; but claimant denies that he and the crew left said bark without any hope or expectation of being able to return to her, or of being able to complete her said voyage, as alleged in the second article of said libel.

Third. He admits the allegations of the third article of said libel.

Fourth. He denies that said bark is now, or was at the time of the filing of said libel, in the custody of this Honorable Court; otherwise he admits the allegations of the fourth article of said libel.

Fifth. He is ignorant as to the allegations of the fifth article of said libel, relating to the willingness and readiness of said libellants to pay whatever sum this Court shall award as salvage upon said goods and accordingly leaves said libellants to prove said allegations, if material, otherwise he admits the allegations of the fifth article of said libel.

Sixth. He admits the allegations of the sixth article, relating to the jurisdiction of this Honorable Court, and denies the remaining allegations of said article, as to the truth of the premises in said libel. And he denies each and every allegation in said libel contained, not herein admitted, denied, or otherwise answered.

Seventh. He alleges that, upon the arrival of said bark and her said cargo at Boston, he came at once to said Boston, accompanied by the other officers of said bark, and there resumed possession of said bark and of said cargo; that afterward, when said bark and cargo had been libelled for salvage, he appeared before this Honorable Court, and filed a claim for said bark and said cargo; that he gave a stipulation for said bark and released her from the custody of this Honorable Court, and was then, and has been constantly from the time that said bark and her said cargo were taken into the custody of this Honorable Court, ready and willing and offered to give such a stipulation as the Court might order for said cargo, to release said cargo from said custody, and to pay whatever salvage the Court might award against said cargo, and would have so released said cargo, and paid salvage thereon, and have proceeded

with his voyage had it not been for the adverse claim to said cargo, interposed by the libellants. That he temporarily unloaded said cargo from said bark, in order to repair said bark; that he has repaired said bark, and is now ready and willing to reload said cargo upon said bark, to resume his voyage aforesaid, and to deliver said cargo according to the terms of the bills of lading aforesaid, and desires, and is entitled in law, to do so.

Eighth. That he has a lien upon said cargo for the carriage thereof, and is entitled by law to carry on said cargo to its destination, and to earn the stipulated freight thereon, which freight amounts to the sum of $5,600 and that he has further a lien against said cargo for general average contribution, for losses, expenses and charges incurred hitherto for its benefit, which contribution amounts to the sum of $2,500, as nearly as can now be estimated.

Ninth. That all and singular the premises are true, and within the jurisdiction of this Honorable Court.

Wherefore claimant prays that said libel may be dismissed with costs, and that this Honorable Court will order said cargo of pitch pine lumber to be delivered to him, as prayed in his claim, filed in this suit.

HANS ANDREASEN.

JOHN LOWELL, *Proctor.*

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

BOSTON, Nov. 29, 1889.

Personally appeared before me the above-named Hans Andreasen, and made oath that the statements of the foregoing answer, by him subscribed, are true.

[SEAL] ALBERT E. LEACH,
Notary Public.

This libel was entered at the September Term of this court, A. D. 1889, and thence was continued to the December Term thereof, A. D. 1889, when on the twenty-seventh day of February, A. D. 1890, the following motion to dismiss was filed in court, viz:

MOTION TO DISMISS.

And now comes James E. Ward, Henry P. Booth, and William H. T. Hughes, co-partners, doing business in the city of New York, under the style of James E. Ward & Company, by Lewis S. Dabney and Frederic Cunningham, proctors, and move this Honorable Court to enter an order, as of 19th November, 1889, dismissing their libel in the above-entitled case, for that this Honorable Court did upon the nineteenth day of November last past, under a libel for salvage filed in this court, and still pending therein, by W. W. Black and others against the bark Eliza Lines, her cargo and freight, said cargo being said 295,000 feet of lumber above mentioned, order that said cargo be sold, and the proceeds brought into the registry of this court.

Wherefore, inasmuch as said order has been carried into effect and possession of said cargo cannot be given them, the libellants pray that their libel may be dismissed.

By their Proctors,

L. S. DABNEY,
F. CUNNINGHAM.

DECREE.

From said December Term, A. D. 1889, this libel was continued from term to term to this present term, and on the sixteenth day of January, A. D. 1891, the foregoing motion of libellants for leave to have libel dismissed, as of Nov. 19, A. D. 1889, is allowed by the Court, and It is ordered, adjudged and decreed that the said libel be dismissed, as of that date.

On the twenty-fourth day of January, A. D. 1891, the following claim of appeal was filed in court by claimant and respondent, viz:

CLAIM OF APPEAL.

And now comes Hans Andreasen, claimant of the cargo of the bark Eliza Lines, and respondent in the action above named, and, a final decree having been made and entered in said cause, appeals from said decree, and prays that his said appeal may be allowed.

By his Proctor,

JOHN LOWELL.

And thereupon said appeal is allowed by the Court.

N. B. The deposition of Hans Andreasen which will be found in the case of William W. Black *v.* The Bark Eliza Lines, her cargo and freight, was also taken for use in this case.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, Benjamin H. Bradlee, deputy clerk of the District Court of the United States, for the District of Massachusetts, certify that the foregoing is a transcript of the record of said cause in said court, made up pursuant to Admiralty Rule 52.

In testimony whereof I hereunto set my hand and affix the seal of said Court, at Boston, in said district, this ninth day of March, A. D. 1892.

[SEAL] BENJ. H. BRADLEE,
Deputy Clerk.

PROCEEDINGS IN CIRCUIT COURT.

No. 3547.

CARGO EX THE ELIZA LINES.

HANS ANDREASEN, *Claimant, Appellant,*
v.
JAMES E. WARD ET AL., *Libellants, Appellees.*

MOTION OF HANS ANDREASEN, *Claimant, Appellant.*

[FILED MARCH 22, 1892; ALLOWED (COLT, J.) MARCH 24, 1892.]

And now comes Hans Andreasen, claimant of cargo ex bark Eliza Lines, and appellant in the case abovenamed, and moves that the Court will order the notes made by the Judge of the District Court of the testimony of Charles West and Hans Andreasen, at the hearing in said District Court, on Oct. 18, 1889, upon the motion of Hans Andreasen to bond the cargo of the bark

Eliza Lines, and upon the motion of Bradford Darrach, in behalf of James E. Ward et al., for the sale of said cargo, and upon the libel of said James E. Ward et al., against said cargo, for the possession thereof, to be incorporated in the record of the District Court in this case, and to be made part thereof.

JOHN LOWELL,

Attorney and Proctor for HANS ANDREASEN, *Claimant.*

[MEMORANDUM. The Notes of Judge of District Court, referred to in the above motion, are printed in cases entitled "The Eliza Lines", Nos. 3545 and 3546 (cross appeals), on pages 76 to 78, inclusive, and by direction of counsel are not reprinted here. JOHN G. STETSON, *Clerk.*]

[MEMORANDUM. The Depositions of F. W. Gorham, Charles Hunt, Joseph P. Ellicott and Gjert Lootz, printed in cases entitled "The Eliza Lines", Nos. 3545 and 3546 (Cross Appeals), were also taken for use in this case, but, by direction of counsel, are not reprinted here. JOHN G. STETSON, *Clerk.*]

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

No. 3548.

HANS ANDREASEN,

LIBELLANT, APPELLANT,

v.

295,000 FEET OF LUMBER AND BRADFORD DARRACH ET AL.,

APPELLEES.

RECORD.

JOHN LOWELL,
EDWARD S. DODGE,
for Libellant, Appellant.

LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
for Appellees.

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.
1893.

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PROCEEDINGS IN CIRCUIT COURT.

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DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

HANS ANDREASEN, *Libellant*,

v.

295,000 FEET OF LUMBER AND BRADFORD DARRACH ET AL.

TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

At the District Court of the United States, begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday (being the seventeenth day) of March, in the year of our Lord, eighteen hundred and ninety-one.

Before

THE HONORABLE THOMAS L. NELSON, *Judge*.

HANS ANDREASEN, *Libellant*,

v.

295,000 FEET OF LUMBER AND BRADFORD DARRACH ET AL.

This libel was filed in court on the twenty-seventh day of November, A. D. 1889, and is as follows, viz:

LIBEL.

To the Honorable THOMAS L. NELSON, *Judge of the District Court of the United States, within and for the District of Massachusetts:*

Hans Andreasen, of Farsund, in the Kingdom of Norway, on behalf of himself, and the owners of the Norwegian bark, Eliza Lines, of said Farsund, exhibits this his libel and complaint against 295,000 feet more or less of hard-pine lumber, lately laden on board said bark Eliza Lines, and against Bradford Darrach, of the

city and State of New York, and against James E. Ward, Henry B. Booth and William H. T. Hughes, co-partners, doing business in the city of New York, under the firm name and style of James E. Ward & Company, in a cause of affreightment and general average, civil and maritime. And thereupon said libellant alleges and articulately propounds as follows:

First. That he is now, and was in the month of August, 1889, the master of the said bark Eliza Lines; that in said month of August, said bark was at Pensacola, Florida, whence she had proceeded in pursuance of a charter-party, whereby the said James E. Ward & Company had chartered said bark for a voyage from said Pensacola to Montevideo, in the province of Uruguay, South America, with a cargo of hard-pine lumber; that said cargo was laden on board at said Pensacola, and thereupon said libellant, as master of said bark, signed and delivered to said James E. Ward & Company, or their agents, bills of lading of said cargo, wherein and whereby he agreed to carry said cargo to said Montevideo, and to deliver said cargo to Messrs. Thomas Drysdale & Company, or to their assigns, at said Montevideo or Buenos Ayres, at whichever place he might, upon arrival at said Montevideo, be ordered to deliver it, he or they paying freight therefor, according to the terms of the charter party.

Second. That, on August 13, 1889, he set sail in said bark from said Pensacola, with said cargo on board said bark, bound for said Montevideo, and on Sept. 7, 1889, said bark encountered a storm and heavy sea, which continued with increasing violence throughout Sept. 8 and 9, causing the bark to labor heavily, to take in water and to roll and list heavily to starboard, so that on Monday, Sept. 9, 1889, it became necessary, in order to prevent said bark from capsizing, to cut away her fore and main masts, which was accordingly done to save said bark and her cargo aforesaid from destruction; said sacrifice of the masts was successful, and said bark then at once righted.

Third. That, by reason of the loss of said masts, and by reason of other damage which said bark had suffered from perils of the sea, during the gale aforesaid, the libellant together with the other officers and crew of said bark were compelled to leave her; they

were taken off of said bark by a passing vessel, and carried to Port Maitland in the Province of Nova Scotia: and subsequently said bark and cargo were brought by salvors into the port of Boston, in this District of Massachusetts, on Thursday, Sept. 19, 1889.

Fourth. That, on the arrival of said bark and cargo at Boston, as aforesaid, the libellant accompanied by the other officers of said bark came to Boston and there resumed possession of said bark and said cargo.

Fifth. That, on Sept. 26, 1889, said salvors filed in this Honorable Court, a libel for salvage against said bark Eliza Lines, her cargo of hard pine aforesaid, and the freight money pending for the carriage of said cargo.

Sixth. That, on Sept. 27, 1889, libellant appeared in this Honorable Court, and filed a claim for said bark, and her said cargo, and was then ready and willing and offered to file a stipulation as the Court might order for said cargo, to repair said bark and to resume his aforesaid voyage, and to deliver said cargo according to the terms of the charter-party and bills of lading aforesaid, and was desirous so to do.

Seventh. That, on said Sept. 27, 1889, Bradford Darrach of New York, in the State of New York, also appeared in this Honorable Court, and filed a claim for said cargo, in behalf of the aforesaid James E. Ward & Company, and prayed that this Honorable Court would order said cargo to be delivered to him; and subsequently, viz: on Oct. 18, 1889, said Darrach, on behalf of said James E. Ward & Company, moved this Honorable Court to order said cargo to be sold. And also, on said Oct. 18, 1889, said James E. Ward, Henry P. Booth and William H. T. Hughes, co-partners as aforesaid, filed in this Honorable Court a libel against said cargo for the possession thereof.

Eighth. That, after a hearing had upon the aforesaid claims and said libel for possession, and due deliberation thereon, this Honorable Court, did, on Nov. 16, 1889, order, adjudge and decree that said James E. Ward and others, owners of said cargo, were entitled to the possession of said cargo, and did order said cargo to be sold by the Marshal, as prayed by said Ward and others.

Ninth. That, upon the termination of the carriage of said cargo

in said bark Eliza Lines, by the decree and order aforesaid of this Honorable Court, the aforesaid claimant Darrach and said owners of said cargo became and are bound to pay to the libellant, on behalf of himself and the owners of said bark, the freight money for the carriage of said lumber, which freight money at the rates specified in the charter-party aforesaid amounts to the sum of $5,600, which sum libellant seeks to recover in this suit.

Tenth. That, by reason of the sacrifice of the masts of said bark, as set forth in the second article of this libel, as well as by reason of other charges and expenses incurred by the libellant for the benefit of said cargo, the aforesaid claimant, Darrach, and said James E. Ward & Company, owners of said cargo, became and are bound to pay to the libellant, on behalf of himself and the owners of said bark, the sum of $2,500, as nearly as can now be estimated, as contribution in general average, which sum also libellant seeks to recover in this suit.

Eleventh. That said cargo is now in the port of Boston, and within the admiralty and maritime jurisdiction of this Honorable Court; and that said Darrach, Ward, Booth and Hughes have by their several proceedings in this Honorable Court, above set forth, in relation to said cargo, submitted themselves to said jurisdiction.

Twelfth. That all and singular the premises are true, and within said jurisdiction.

Wherefore said libellant prays that process in due form of law may issue against said 295,000 feet of hard-pine lumber; that the said Darrach, Ward, Booth and Hughes, and all persons having any interest in said lumber, may be summoned to appear and answer the premises; and that this Honorable Court will be pleased to decree payment to libellant of his claims for freight money and general average above set forth, and will grant to said libellant such other and further relief in the premises as in law and justice he may be entitled to receive, and will grant said relief and decree said payment, not only against said lumber, but also personally against the aforesaid Darrach, Ward, Booth and Hughes.

H. ANDREASEN.

JOHN LOWELL,
EDWARD S. DODGE,
Proctors.

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

BOSTON, Nov. 27, 1889.

Personally appeared before me the said libellant, Hans Andreasen, and made oath, that the statements of the foregoing libel by him subscribed are true.

[SEAL] ALBERT E. LEACH, *Notary Public.*

WARRANT AND MONITION.

Thereupon, on said twenty-seventh day of November, A. D. 1889, by order of the Judge, a warrant and monition issued, commanding the Marshal to give notice to all persons concerned, that the foregoing libel has been filed, and that trial would be had thereon, at a District Court to be holden at the United States court house in Boston, in said District of Massachusetts, on Friday, the sixth day of December next, at ten o'clock A. M. And further to serve this precept by reading the same or giving a copy thereof to Lewis S. Dabney and Frederic Cunningham, proctors for the said Darrach and James E. Ward & Company. And to make due return of his doings.

And the Marshal made return as follows, viz:

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

BOSTON, Nov. 29, 1889.

Pursuant hereunto I have given notice to all persons concerned, that the libel within named has been filed, and that trial will be had thereon on the sixth day of December next. On the twenty-ninth day of November, I served the within precept upon Lewis S. Dabney and Frederic Cunningham, proctors of the within named defendants, as within directed, by giving to each of them in hand, at Boston, a true and attested copy of the within precept.

W. S. HOYT,
Deputy United States Marshal.

This libel was entered at the September Term of this court, A. D. 1889, and thence was continued to the December Term thereof, A. D. 1889, when on the sixth day of December, A. D. 1889, the following motion to dismiss was filed in court, viz:

MOTION TO DISMISS.

And now comes Bradford Darrach, of the City of New York, and also James E. Ward, Henry P. Booth and William H. T. Hughes, co-partners, doing business in said New York, under the style of James E. Ward & Company, by Lewis S. Dabney and Frederic Cunningham, proctors, appearing specially for the purpose, and move this Honorable Court to dismiss the libel in the above entitled case, as to them, for that no one of them, the said respondents, is an inhabitant of this District, or has been within said district since the filing of said libel, and for that no sufficient service of the monition issued upon said libel has been made upon them or upon any of them, and that this Honorable Court has no jurisdiction to require them to answer the libel aforesaid or to proceed further in the premises as against them.

LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
Proctors.

From said December Term, A. D. 1889, this libel was continued from term to term to the December Term thereof, A. D. 1890, when, on the sixteenth day of January, A. D. 1891, the following motion for a stipulation was filed by leave of Court, as of Nov. 27, A. D. 1889, viz:

MOTION FOR A STIPULATION, ETC.

And now comes Hans Andreasen, the libellant in the case above named, and prays this Honorable Court to order the said Darrach, or said James E. Ward and others, named as respondents in said libel to file stipulations, in the usual form to the action and for costs, to said above named libel; and he further prays that, until such stipulations are given, this Court will rescind and restrain the

order and warrant for the sale of said 295,000 feet of lumber, late cargo of the bark Eliza Lines, which order and warrant were heretofore, viz, upon Nov. 16 and 19, 1889, made and issued in the suit, William W. Black *v.* The Bark Eliza Lines, her cargo, etc.; upon the motion of said Darrach, or said James E. Ward, *et al.*, and that, if no such stipulations are given, the Court will order said sale abandoned.

By his Proctor,
EDWARD S. DODGE.

And on the sixteenth day of January, A. D. 1891, the foregoing motion was disallowed, as of Nov. 27, 1889.

DECREE.

On the sixteenth day of January, A. D. 1891, this cause came on to be heard, and It was ordered, adjudged and decreed by the Court that said libel be dismissed as against Bradford Darrach and James E. Ward and Company. And It was ordered that the sum of $1,450 be awarded to the libellant as *pro rata* freight, to be paid only from proceeds of cargo in registry of court.

All questions relating to general average losses to be referred to an assessor.

On the twenty-fourth day of January, A. D. 1891, the following claim of appeal, by libellant, was filed in court, viz:

CLAIM OF APPEAL.

And now comes the libellant, and a final decree having been made and entered in said cause, appeals from said decree, and also from the several interlocutory orders and decrees heretofore made in said cause, and prays that said appeal may be allowed.

By his Proctors,
JOHN LOWELL,
EDWARD S. DODGE.

And thereupon said appeal was allowed by the Court.

From said December Term, A. D. 1890, this libel was continued to this present term, and on the thirteenth day of May, A. D. 1891, the following appointment of assessor was filed in court, viz:

APPOINTMENT OF ASSESSOR.

It is hereby ordered by the court that Theodore W. Gore be appointed Assessor in this case, and that all questions relating to general average losses in said case be referred to him, as such assessor.

On the fourteenth day of May, A. D. 1891, the following report of Theodore W. Gore, assessor, was filed in court, viz:

REPORT OF ASSESSOR.

Having examined the papers, and the various decrees in this suit and in the several other suits, relating to the facts involved herein, I find, as matters of fact, the following: —

That the vessel upon her arrival at the port of Boston was appraised by appraisers, whose appraisement was approved by the court, at the sum of $2,250, which value is represented by stipulation now in the court, in the case of William W. Black against the bark Eliza Lines, her cargo and freight.

That her cargo, consisting of 295,000 feet of lumber, or thereabouts, was sold by order of the Court; and that after all the charges pertaining to its discharge, wharfage, storage, etc., were discharged, there remained a residue of $910.74, which is now in the registry of the court.

That a decree of the District Judge in this case, awarding to the libellant as *pro rata* freight, the sum of $1,450, to be paid only from the proceeds of cargo in registry of court, extinguishes any value of cargo, and transfers the amount now in the registry of the court, being the proceeds of the cargo as aforesaid, to the ship-owner, or owners, or master, as such *pro rata* freight.

That there now appears to be the following values: to the ship-owner for the arrived value of the vessel, $2,250; to the ship-owner and her master, $910.74, as *pro rata* freight. Now, since any general average, which may be found to be due the ship-owner, or

owners, or the master, can be assessed upon these values alone, it results that, upon the above findings of facts, to state a general average would be to assess a contribution solely against property which belongs to this libellant and those represented by him; therefore, any apportionment of general average, as against these values, would appear to be useless.

I find the amount of the loss for which contribution should be made in general average, provided there was an interest to contribute, outside of those owned by the master and owner, to be $4,818.

THEODORE W. GORE,
Assessor.

On the fourteenth day of May, A. D. 1891, the following decree was filed in court, viz:

DECREE.

Whereas said libel was, on Jan. 16, 1891, dismissed, as against Bradford Darrach and James E. Ward & Co., and whereas the court did on said Jan. 16 award to the libellant, as *pro rata* freight, the sum of $1,450, to be paid only from proceeds of cargo in the registry of the court, and did refer all questions relating to general average losses to an assessor; and whereas the court did on May 13, 1891, appoint Theodore W. Gore, such assessor, who has reported to the court, and whose report has been accepted and placed on file; and whereas the amount of the proceeds of the cargo aforesaid, now in the registry of the court, has been diminished by the several decrees of the court awarding that certain sums of salvage, costs, and money due upon a certain bottomry bond, be paid out of said proceeds, so that there now remains of said proceeds in the registry, only the sum of $157.23; now therefore, It is ordered, adjudged and decreed that there be paid to said libellant said sum of $157.23, now in the registry of the court, in the suit of *William W. Black* v. *Bark Eliza Lines, her cargo and freight*, in satisfaction of the award aforesaid of the court for *pro rata* freight due to said libellant, and that no claim for general average is allowed.

On the fourteenth day of May, A. D. 1891, the following claim of appeal was filed in court by libellant, viz: —

CLAIM OF APPEAL.

And now comes the libellant, and, a final decree having been made and entered in said cause, appeals from said decree, and also from the several interlocutory orders and decrees heretofore made in said cause, and prays that said appeal may be allowed.

By his Proctors,

JOHN LOWELL,
EDWARD S. DODGE.

And thereupon said appeal is allowed by the Court.

N. B. The deposition of Hans Andreasen, which will be found in the case of William W. Black *v.* The Bark Eliza Lines, her cargo and freight, was also taken for use in this case.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

I, Benjamin H. Bradlee, Deputy Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a transcript of the record of said cause in said court, made up pursuant to Admiralty Rule 52.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Boston, in said district, this eighth day of March, A. D. 1892.

BENJ. H. BRADLEE,
Deputy Clerk.

[SEAL]

[MEMORANDUM. The depositions of F. W. Gorham, Charles Hunt, Joseph P. Ellicott and Gjert Lootz, taken in the Circuit Court, and printed in cases entitled "The Eliza" Lines, Nos. 3545 and 3546 (Cross Appeals), were also taken for use in this case, but by direction of counsel are not reprinted here.

JOHN G. STETSON, *Clerk.*]

Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

THE ELIZA LINES.

No. 3549.

BANQUE DE GÊNES,
Libellant, Appellant,

v.

HANS ANDREASEN,
Claimant, Appellee.

No. 3550.

HANS ANDREASEN,
Claimant, Appellant,

v.

BANQUE DE GÊNES,
Libellant, Appellee.

RECORD.

C. T. & T. H. RUSSELL, *for* BANQUE DE GÊNES.
JOHN LOWELL,
EDWARD S. DODGE, } *for* HANS ANDREASEN.

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.
1892.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

THE ELIZA LINES.

No. 3549.

BANQUE DE GÊNES,
Libellant, Appellant,

v.

HANS ANDREASEN,
Claimant, Appellee.

No. 3550.

HANS ANDREASEN,
Claimant, Appellant,

v.

BANQUE DE GÊNES,
Libellant, Appellee.

RECORD.

C. T. & T. H. RUSSELL, *for* BANQUE DE GÊNES.
JOHN LOWELL,
EDWARD S. DODGE, } *for* HANS ANDREASEN.

BOSTON:
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DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

THE ELIZA LINES.

BANQUE DE GÊNES, *Libellant*,
v.
HANS ANDREASEN, *Claimant, Respondent.*

TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

At the District Court of the United States, begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday (being the seventeenth) day of March, in the year of our Lord, one thousand eight hundred and ninety-one.

Before

THE HONORABLE THOMAS L. NELSON, *Judge.*

BANQUE DE GENES, *Libellant*, *v.* THE ELIZA LINES.

This libel was filed in court on the seventh day of December, A. D. 1889, and is as follows, viz:

LIBEL.

To the Honorable THOMAS L. NELSON, *Judge of said Court:*

The libel and complaint of the Banque de Gênes of Genoa, Italy, a banking corporation duly established by law, against the bark Eliza Lines, her tackle, apparel and furniture, and her freight earned on the carriage of the cargo of lumber recently unloaded in

Boston, in a cause of contract, civil and maritime. And the libellant alleges and articulately propounds as follows:

First. It is a banking corporation duly established by law in said Genoa. The Merchants Bank of Pensacola, a banking corporation duly established by law and located in Pensacola, Florida, was, in the matters hereinbefore alleged, the agent of the libellant.

Second. The said bark Eliza Lines, is a Norwegian bark of about four hundred and sixty-two tons burden, commanded by Hans Andreasen. Her home port is in Norway.

Third. Heretofore, to wit, on or about July 24, 1889, the said bark was in the said port of Pensacola under charter, and loading lumber for Montevideo. She was a foreign vessel in said port, and was in need of repairs, provisions, and other necessaries, in order to render her seaworthy and fit for her intended voyage.

Fourth. At the request of her master, Hans Andreasen, the libellant, on said day, by its agent, said Merchants Bank, furnished to him money necessary for the use of said vessel, to fit her with the necessary repairs, provisions and necessaries for said voyage, to the amount of three hundred pounds British sterling; the said sum was expended by the master in such repairs, supplies and necessaries.

Fifth. The said master, to secure said loan, gave a note and agreement, dated July 24, 1889, a copy of which is annexed, marked "Exhibit A", for the said sum of three hundred pounds sterling, payable fifteen days after the arrival of the vessel at her port of destination, or other intermediate port at which the voyage should end, payable to the order of himself, and endorsed the same to the libellant.

Sixth. The money so furnished by the libellant was necessary to render said vessel seaworthy and fit for her intended voyage. Said vessel could not have proceeded with safety to sea on her said voyage without said money and the repairs, supplies and necessaries for which it was expended, and the said money was furnished, and repairs, supplies and necessaries furnished on the credit of said bark and freight.

Seventh. Said bark sailed on her voyage for Montevideo, Aug. 19, 1889, with a cargo of lumber. She afterward met with heavy

weather, became disabled and was abandoned at sea by her crew. After abandonment the bark was found and salved, and brought into the port of Boston, as an intermediate port at which her voyage ended. She arrived in Boston on or about Sept. 18, 1889, and earned freight.

Eighth. Said note and agreement was endorsed to the libellant, and the libellant is the owner thereof and of the claim therein stated and thereby secured, and has a maritime lien on said bark and any freight earned, for the amount thereof.

Ninth. The said sum of three hundred pounds so loaned by the libellant for the necessary use of said bark, and for which said draft was given, has not been repaid to the libellant, although it has demanded payment of the same; and the said bark and freight, and her owners, owe the libellant the said three hundred pounds British sterling, to wit, fifteen hundred dollars ($1,500) with interest thereon, and the libellant seeks to recover said sum by this libel.

Tenth. The said bark Eliza Lines and her said freight, are now in the port of Boston, and within the jurisdiction and process of this Honorable Court.

Eleventh. All and singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the libellant prays that process in due form of law may issue against the said bark Eliza Lines, her tackle, apparel and furniture, and her said freight now earned, and that all persons intervening for their interest therein may be summoned to appear and answer all and singular the premises, and that this Honorable Court would be pleased to decree the payment of the amount aforesaid, with interest and costs, and will grant such further relief, as to justice may appertain.

FRANCIS PEABODY,
for La Banque de Gênes and Underwriters.

C. T. & T. H. RUSSELL,
Proctors for Libellant.

Subscribed and sworn to by said Francis Peabody, Dec. 7, 1889.
Before me,

[SEAL] CHAS. THEO. RUSSELL, Jr.,
Notary Public.

EXHIBIT A.

£300. PENSACOLA, FLA., July 24, 1889.

Fifteen days after arrival at the port of destination, or other intermediate port, at which shall end the voyage of the Nor. B'k, called Eliza Lines, of which I am master, I promise to pay to the order of myself, the sum of three hundred pounds sterling, in approved demand bills on London, value received in cash for the last expenses necessary to the undertaking of the voyage from Pensacola to Montevideo, and I accept all the conditions set down in the rules of the Merchants Bank of Pensacola relating to loans on freight, of which I have received a copy, and I hereby hypothecate ship and freight for repayment of said loan, with priority over every other credit, and I hereby assign therefor to the holders of this bill enough of the present freight to cover the sum of the above loan, with power to collect it when due.

(Signed) HANS ANDREASEN,
Master of Bark Eliza Lines.

[*Endorsed:*] HANS ANDREASEN.

STIPULATION FOR COSTS AND EXPENSES.

On said seventh day of December, A. D. 1889, before this court personally appeared Hans Andreasen, master of said bark, and produced for sureties Charles S. Gill and Gjert Lootz, both of said Boston. And the said Andreasen, Gill and Lootz, submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors and administrators jointly and severally in the sum of two hundred dollars unto the said libellant, that the said Andreasen should pay all costs and expenses which should be awarded against him in this suit, upon the final adjudication thereof, or by any interlocutory order whether it be in this or any appellate court.

On said seventh day of December, A. D. 1889, the following claim for bark was filed in court by consent, viz:

CLAIM OF HANS ANDREASEN FOR BARK.

And now comes Hans Andreasen, of Farsund, in the Kingdom of Norway, and says that David Davidson, of said Farsund, is the managing owner of said bark, and that the sole, true and *bona fide* owners of said bark are said Davidson and about ten other persons whose names he is not now prepared to state, and that he, said Andreasen, is the master of said bark, and is the lawful bailee thereof for said owners, and is the only person entitled to the possession thereof.

Wherefore he prays that said bark may be delivered to him upon his giving such stipulations with sureties as the court shall direct.

HANS ANDREASEN,
by G. LOOTZ, *Agent.*

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

BOSTON, Jan. 23, 1891.

Personally appeared before me, the said G. Lootz, and made oath in due form before me, that the statements of the foregoing claim, by him subscribed, are true to the best of his knowledge, information and belief.

[SEAL]

EDWARD S. DODGE.
Notary Public.

STIPULATION TO THE ACTION.

On said seventh day of December, A. D. 1889, before this court personally appeared Hans Andreasen, master of said bark, and produced for sureties Charles S. Gill and Gjert Lootz, both of said Boston, and the said Andreasen, Gill and Lootz, submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors and administrators, jointly and severally, in the sum of twenty-four hundred dollars unto the said libellant, that the said Andreasen should abide by all orders and decrees, interlocutory or

final, of the court, and should pay the amount of the final decree of the court, and all sums of money that he should be ordered to pay by the final decree of the court, whether it be in this or any appellate court.

On the eighth day of February, A. D. 1890, the following answer was filed in court, viz.:

ANSWER.

To the Honorable THOMAS L. NELSON, *Judge of the District Court of the United States, within and for the District of Massachusetts:*

The answer of Hans Andreasen, of Farsund, in the Kingdom of Norway, master and claimant of the Norwegian bark, Eliza Lines, to the libel and complaint of the Banque de Gênes, of Genoa, Italy, against said bark, Eliza Lines, her tackle, apparel and furniture, and her freight.

And thereupon, said claimant, answering said libel, alleges and articulately propounds as follows:

First. He is ignorant of the matters alleged in the first article of said libel, and so can neither admit nor deny said allegations, but leaves libellant to prove them, if material.

Second. He admits the allegations of the second and fifth articles of said libel.

Third. He admits the allegations of the third article of said libel, excepting the allegation that said bark Eliza Lines, while at said port of Pensacola, was in need of any repairs, or in need of anything to render her seaworthy, which allegations he denies, and, on the contrary, alleges that said bark, at said time, needed no repairs, and was entirely seaworthy.

Fourth. He admits the allegations of the fourth article of said libel, excepting the allegations that said Merchants Bank furnished, or was requested to furnish, him any money for repairs, or that any sum was expended by him for repairs, or that the sum of three hundred pounds sterling was furnished to him, or expended by him: all of which allegations he denies, and alleges that, while at said

Pensacola, said bark needed no repairs, as stated in the preceding article of this answer, nor were any repairs made upon said bark, at said time or place; and he further alleges that a considerable portion of the aforesaid sum of three hundred pounds was exacted by said Merchants Bank for commissions to said bank, and that a considerable further portion of said sum was exacted by said bank for maritime interest or premium, and that the sum of money actually furnished him by said bank, and expended by him, was $1,355.60.

Fifth. Answering the sixth article of said libel, he denies that the money furnished by the libellant was necessary to render said vessel seaworthy, and, as stated above, denies that any repairs upon said vessel were necessary, or were made or furnished by any one, while said vessel was at Pensacola. He is ignorant whether or not said money was furnished, or whether said alleged supplies and necessaries were furnished upon the credit of said bark and freight, and so leaves libellant to prove said matters if material. He alleges that he made no effort whatever, while at said Pensacola, either to communicate with the owners of said bark, to acquaint them with the need of money, supplies or necessaries for said bark, nor did he make any attempt whatever, at said Pensacola or elsewhere, to obtain said money, supplies or necessaries from any other party than the Merchants Bank aforesaid; and he further alleges that, to the best of his knowledge, information and belief, said money could have been readily obtained, either from the owners of said bark, or from parties at said Pensacola other than said Merchants Bank. He admits the remaining allegations of the sixth article of said libel.

Sixth. He admits the allegation of the seventh article of said libel, excepting the allegation that said bark earned freight. He alleges that, upon the arrival of said bark at Boston, the cargo of lumber laden on board of her was sold by order of this Honorable Court, and that the voyage upon which she was engaged at said time was broken up, and will never be completed; that he claims that freight is due, and has brought an action to recover said freight, which action is still pending and undetermined.

Seventh. He is ignorant of the matters alleged in the eighth ar-

ticle of said libel, and so leaves libellant to prove them, if material; excepting that he denies that libellant has a maritime lien on said bark, or on freight earned, or to be earned, for the amount of said note and agreement, and he alleges that said note and agreement constitute in law, a bottomry bond, and that as such bottomry bond, said note and agreement are invalid and void, both by the law of Norway, which must furnish the rule by which to determine the validity of said bond (and of which law he prays leave to make proof in this court), and also by the law of the United States, for the reasons, among others, that before making said note and agreement, the claimant, as stated in the fifth article of this answer, made no attempt to communicate with the owners of said bark, before subjecting her and her freight to said bottomry bond, although such communication was entirely possible and practicable, nor did he advertise for any bottomry loan, nor did he make any efforts whatever to obtain said loan from any other party than the Merchants Bank aforesaid. And claimant further alleges, that after said bark arrived in Boston, she was appraised by competent marine surveyors, and was found by them to be of the value of $2,250, in the damaged condition in which she was upon her arrival; that she was, after her said arrival, libelled in this Honorable Court by salvors, to recover salvage compensation for bringing her into port, and said suit for salvage is still pending and undetermined; that on the voyage to Montevideo, before said bark was abandoned, certain general average sacrifices had been made on the part of both vessel and cargo. That, in no event, can the libellant, the Banque de Gênes aforesaid, recover upon said bottomry bond, even if valid, a greater sum than may remain of said $2,250, after payment of such sum as may be awarded by the Court for salvage compensation, together with such sums as she may be compelled to pay in general average.

Eighth. He admits that the money furnished by said Merchants Bank has not been repaid, and denies all the remaining allegations of the ninth article of said libel.

Ninth. He admits that said bark Eliza Lines was, at the time of filing said libel, at Boston, and within the jurisdiction and process of this Honorable Court; whether her freight aforesaid was or not within said jurisdiction and process, he is ignorant, and

so can neither admit nor deny the allegation of the tenth article of said libel regarding it, but leaves libellant to prove the same, if material.

Tenth. He admits the allegation of the eleventh article of said libel regarding the jurisdiction of this Honorable Court; but denies the truth of the premises of said libel, excepting as herein admitted, denied or otherwise answered.

Eleventh. That all and singular the premises of this answer are true, and within the jurisdiction of this Honorable Court.

Wherefore, the claimant prays that said libel may be dismissed with costs.

HANS ANDREASEN,
by GJERT LOOTZ, *Attorney.*

JOHN LOWELL,
EDWARD S. DODGE, } *Proctors.*

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

BOSTON, Feb. 7, 1890.

Personally appeared before me, the above named Gjert Lootz, and made oath that the statements of the foregoing answer, by him subscribed, are true to the best of his knowledge, information and belief.

[SEAL] FRANK E. CLEARY, *Notary Public.*

DEPOSITION OF HANS ANDREASEN.

Present: CHARLES T. RUSSELL, Jr., *for the Libellants;*
JOHN LOWELL and EDWARD S. DODGE, *for the Claimant.*

This deposition is taken by the consent of all parties, and it is agreed that all formalities, and signature of the deponent, may be waived.

G. Lootz sworn as interpreter.

Hans Andreasen, being first duly sworn, desposes and says, as follows:

Direct Examination by Mr. RUSSELL.

Int. 1. What is your full name, captain? *Ans.* Hans Andreasen.

Int. 2. Are you master of the Eliza Lines? *Ans.* Yes.

Int. 3. How long have you been master of her? *Ans.* About twenty months; since the first of May, 1888.

Int. 4. Are you a part owner in her? *Ans.* I am.

Int. 5. How much do you own in her? *Ans.* I can't tell exactly the fraction; the vessel has been divided since I was out at sea, the exact fraction I can't tell.

Int. 6. Where was the Eliza Lines last July? *Ans.* July and part of August, she was lying at Pensacola.

Int. 7. Did you borrow any money for the use of the vessel in Pensacola? *Ans.* I borrowed three hundred pounds.

Int. 8. What did you want the money for? *Ans.* I used part for the provision of the ship, for the disbursements in Pensacola, and a small part for my own cash and the crew.

Int. 9. What is the home port of the Eliza Lines? *Ans.* Farsund, Norway.

Int. 10. Did you have any funds of your own in Pensacola? *Ans.* Nothing.

Int. 11. Of whom did you borrow the three hundred pounds? *Ans.* The Merchants Bank of Pensacola.

Int. 12. Please examine the paper shown you, and state whether it is signed by you. [*Paper marked for identification "W. R."*] *Ans.* Yes, I signed it.

Int. 13. Was there another way in Pensacola of raising the money? *Ans.* I can't tell, I never tried; because that is the general way the other captains take the money.

Int. 14. How long have you owned an interest in the vessel? *Ans.* Since the vessel was purchased, about twenty months ago.

Cross Examination by Mr. DODGE.

Cross-Int. 15. About how many owners are there in the bark Eliza Lines? *Ans.* About twelve.

Cross-Int. 16. Who is the managing owner? *Ans.* D. Davidson.

Cross-Int. 17. Where does he live? *Ans.* He lives in Farsund.

Cross-Int. 18. As nearly as you can tell, state what portion of the bark do you yourself own. *Ans.* Nearly one third, about.

Cross-Int. 19. Is that the application that you made to the Merchants Bank for a loan? [*The upper half of paper marked for identification "W. R." shown witness.*] *Ans.* Yes.

Cross-Int. 20. While you were at Pensacola, did you have any communication with any of the other owners of the Eliza Lines? *Ans.* Yes, but not regarding any draft, any money; I had letters from my owners.

Cross-Int. 21. Do all the other owners live in Farsund? *Ans.* Not in the city itself. It is a little country place. They are all spread round the country within a small radius of Farsund.

Cross-Int. 22. Do you know whether there are any means of communicating by cable between Pensacola and Farsund? *Ans.* Yes, there is telegraphic communication.

Cross-Int. 23. Before applying to the bank for a loan, or receiving the loan from the bank, did you communicate with the owners at all, regarding any need of money for the bark? *Ans.* No.

Cross-Int. 24. Before taking the loan from the bank, did you advertise that you needed money for the purposes of the bark, or apply to any other corporation or person than the Merchants Bank? *Ans.* No.

Cross-Int. 25. What sum of money did you actually receive from the bank? *Ans.* I received from the bank, $1,353.60.

Cross-Int. 26. Can you state how that sum was arrived at, by what method of calculation? *Ans.* Three hundred pounds sterling at the rate of $4.80, to the pound, less six per cent., making $1,353.60.

Cross-Int. 27. When did the Eliza Lines sail from Pensacola? *Ans.* August 13.

Cross-Int. 28. Did she suffer sea damage? *Ans.* Yes, she suffered sea damage.

Cross-Int. 29. Did you complete your voyage to Montevideo? *Ans.* No.

Cross-Int. 30. What became of the Eliza Lines on that voyage? *Ans.* The ship became leaky, and the masts got overboard, and I abandoned her.

Cross-Int. 31. Do you know what afterward became of her? *Ans.* She was brought into Boston.

Cross-Int. 32. What became of the cargo of lumber on board of her? *Ans.* The cargo was sold at auction in Boston.

Cross-Int. 33. Have you received any freight for the carriage of that cargo? *Ans.* None.

Cross-Int. 34. Do you know whether or not there is a claim by salvors, who brought her into Boston, against the vessel? *Ans.* Yes.

Cross-Int. 35. Has that claim been paid? *Ans.* No.

Cross-Int. 36. After the Eliza Lines had arrived at Boston, did you hold any surveys upon her to ascertain her value? *Ans.* Yes.

Cross-Int. 37. Do you know what her value was in her damaged condition as ascertained by the survey when she arrived in Boston? *Ans.* The ship was appraised at $2,250.

Cross-Int. 38. Who were the appraisers? *Ans.* I don't remember the names. (*Referring to the survey.*) A. G. Whidden, marine surveyor; A. F. Sweetland, shipwright; and L. Fredrikses, master of the Norwegian bark, Argentina.

Cross Int. 39. Is the Eliza Lines about to sail upon a voyage? *Ans.* Yes.

Cross-Int. 40. What is the voyage? *Ans.* To either Lisbon or Cadiz from here.

Cross-Int. 41. Will she ever then complete the voyage for which she took this loan at Pensacola? *Ans.* No.

Cross-Int. 42. Since her arrival in Boston has the Eliza Lines been repaired? *Ans.* Yes.

Cross-Int. 43. At about what expense was she repaired? *Ans.* I can't tell yet, the bills have not been paid.

Direct Examination resumed by MR. RUSSELL.

Int. 44. Captain, how many letters did you receive from the owners while you were in Pensacola? *Ans.* Either one or two, I can't tell exactly.

Int. 45. Have you got them here? *Ans.* I haven't them with me, but I have them on board the ship, I think.

Int. 46. Did you in any way inform the owners that you had got to borrow some money for the ship's use? *Ans.* Not till after I had drawn the money, and then I informed my owners that I had drawn so much.

Int. 47. Did your correspondence with the owners relate at all to getting money, or the need of money? *Ans.* I didn't write anything about that.

Int. 48. Did the owners in any way know that it would be necessary for the vessel to borrow money in Pensacola? *Ans.* I think they did.

Int. 49. And it was necessary to borrow the money, wasn't it? *Ans.* Yes.

Int. 50. Where did the vessel come from before she got to Pensacola? *Ans.* From Buenos Ayres.

Int. 51. With cargo? *Ans.* In ballast.

Int. 52. The owners, therefore, knew, did they not, that you had no freight when you got to Pensacola? *Ans.* Yes.

HANS ANDREASEN.

DECREE.

This libel was entered at the December Term of this court, A. D. 1890, when on the sixteenth day of January, A. D. 1891, after a full hearing of the cause upon the facts proved, and arguments of counsel, and mature deliberation thereon had, It was ordered, adjudged and decreed by the court, that the said libellant recover against the said bark Eliza Lines, the sum of fourteen hundred and fifty-eight dollars, and interest from the date of libel, the same to contribute a proportional share of the salvage awarded against ship and freight.

On the twenty-third day of January, A. D. 1891, the following appeal of libellant was filed in court, viz:

APPEAL OF LIBELLANT.

In the above-entitled cause the libellant appeals from the decree and order of the court, and prays that its appeal may be allowed.

By its Proctors,

C. T. & T. H. RUSSELL.

And thereupon said appeal was allowed by the Court.

On the twenty-fourth day of January, A. D. 1891, the following appeal by claimant and respondent was filed in court, viz:

APPEAL OF CLAIMANT.

And now comes Hans Andreasen, claimant of the bark Eliza Lines, and respondent in said cause, and a final decree having been made and entered in said cause, appeals from said decree, and prays that his said appeal may be allowed.

By his Proctors,

JOHN LOWELL,
EDWARD S. DODGE.

And thereupon said appeal was allowed by the Court.

From said December Term, A. D. 1890, this libel was continued to this present term. And now on this thirteenth day of May, A. D. 1891, the following final decree is entered, viz:

FINAL DECREE.

It appearing that the libellant is entitled to recover against the bark and freight the sum of $1,458, and interest from the date of the libel ($124), in all $1,582, and costs of suit, but that the same should be paid out of the appraised value of said bark, $2,250, and freight, $910.74, as ascertained in the suit in this court, of William W. Black against said bark, cargo and freight, after deduction and payment therein of salvage and costs as awarded ($2,068.06), said balance being $1,092.68, and that the libellant is entitled to such proportion of said balance ($1,092.68) as the said sum of $1,58

bears to the aggregate appraised value of vessel and freight, as ascertained in said suit ($3,160.74), the said proportion being the sum of $546.84, It is thereupon ordered, adjudged and decreed, that the libellant recover the said sum of $546.84, and that $157.62 of said decree be recovered against and paid out of the freight money in the registry in the said suit, and that judgment for the balance of said decree, $389.22, and costs of court taxed at . . . . be entered against the stipulators in this suit of the Banque de Gênes aforesaid, and that libellant recover nothing further against said stipulators.

On the thirteenth day of May, A. D. 1891, the following claim of appeal by libellant was filed in court viz:

LIBELLANT'S APPEAL.

And now in the above entitled cause the libellant appeals from each and every decree entered therein, and prays that its appeal may be allowed.

By its Proctors,
C. T. & T. H. RUSSELL.

And thereupon said appeal is allowed by the Court.

On the thirteenth day of May, A. D. 1891, the following claim of appeal by claimant and respondent was filed in court, viz:

CLAIMANT'S APPEAL.

And now comes Hans Andreasen, claimant of the bark Eliza Lines, and respondent in said cause, and, a final decree having been made and entered in said cause, appeals from said decree, and from each and every decree entered in said cause, and prays that his said appeal may be allowed.

By his Proctors,
JOHN LOWELL,
EDWARD S. DODGE.

And thereupon said appeal is allowed by the Court.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

I, Benjamin H. Bradlee, Deputy Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a transcript of the record of said cause in said Court, made up pursuant to Admiralty Rule 52.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at Boston, in said District, this eighth day of March, A. D. 1892.

[SEAL] BENJ. H. BRADLEE,
Deputy Clerk.

APPLICATION TO BANK FOR LOAN.

[Marked For Identification "W. R."; See Pages 10 and 11 of this Record.]

THE MERCHANTS BANK OF PENSACOLA,

Pensacola, Florida, U. S. A.

The undersigned requests a loan of £300 upon the freight of £1300 of the Nor Bark called Eliza Lines of 462 Tons burthen, built in the year 1864, classed A2* – 2L owned by D Davideon Captain H. Andreassen insured in Norway Porsgrund for the sum of 26000 Krowns now lying in the Port of Pensacola, which will be earned as freight in a voyage from Pensacola to Buenos Ayres according to the annexed rules.

Made in two originals, one of which accomplished the other to stand void and of no effect.

The Owner or Captain,

H. ANDREASEN.

£300 Pensacola, Fla., July 24 1889.

Fifteen days after arrival at the Port of destination, or other intermediate Port, at which shall end the voyage of the Nor Bark called Eliza Lines, of which I am Master, I promise to pay to the order of myself, the sum of Three Hundred Pounds Sterling in approved demand bills on London, value received in cash for the last expenses necessary to the undertaking of the voyage from Pensacola to Buenos Ayres and I accept all the conditions set down in the rules of The Merchants Bank of Pensacola relating to loans on freight, of which I have received a copy, and I hereby hypothecate ship and freight for repayment of said loan, with priority over every other credit. and I hereby assign therefor, to the holders of this bill, enough of the present freight to cover the sum of the above loan, with power to collect it when due.

H. ANDREASEN,
Master of *Nor Bark "Eliza Lines"*.

Rules for Loans on Freight.

The loans which the Merchants Bank of Pensacola agrees to make on freights shall confer to the holders of this note (in the same way as to shippers the advances on freight granted at their risk), right of priority on the freight, and are subject to the following rules:

1. When the loan is made a promissory note will be given by the Captain or owner on the form required by the Merchants Bank of Pensacola.

2. Any owner desirous of obtaining a loan on freight from the Merchants Bank of Pensacola, must make his request in accordance with the printed form which will be given him for the purpose.

The form will indicate among other things:

A. The rig, name, flag, tonnage and classification of the vessel.
B. The voyage she is about to make.
C. The amount of freight upon which the loan is asked.
D. The amount of loan asked for.
F. The signature of owner or Captain.

3. The loan must never exceed a third of the whole freight the vessel may make, except by special arrangement.

4. The owner or Captain, before he can obtain a loan, must produce, if practicable, the bills of lading signed by the shipper.

5. The loan must be repaid at the fixed term, and the freight and vessel will be liable to the repayment of the loan, with priority over every other credit, the freight being assigned to the holders of this note, to the extent of the amount of the loan, and the holders of this note, shall have the power to collect it, when due, from the consignees of the cargo who are to pay the freight.

6. In the event of the vessel, on the arrival at the port of destination, being ordered to any other port, the amount of the loan must be repaid, before the ship sails.

7. Any Captain taking his vessel from a port, in which he has to repay a loan, without having done so, must pay as liquidated damages, 20% upon the sum due, besides paying all expenses caused to the holders of this note thereby.

8. If the loan be not repaid, when it falls due, the holders of this note will proceed to enforce payment, and will be entitled to interest at the rate of 8 per cent. per annum, until the payment is made.

9. Loans shall always be exempt from any contribution to either general or particular average.

10. The premium and interest on the sums granted in loan on freight according to the list, must always be deducted from the amount of the loan itself, and in case of a total loss, if no freight is paid, the sums received as a loan shall not be paid back, except the amount in excess of one-third part of the freight taken without the consent of the BANK.

11. The owner or the Captain shall not take any other advances or loan on the same freight, either from the shippers, or others, but should he take any, he shall be bound to repay to the holders of this note, the loan taken from the BANK.

12. The Captain shall give immediate notice on arrival at port of discharge, to the MERCHANTS BANK OF PENSACOLA, or to their Agents, otherwise he shall incur the penalty of 20% on the amount of the loan.

Pay Banca di Genova or order.

H. ANDREASEN.

Pagate all' ordine dello Spett Banco d'Italia i Rio della Plato Valuta per l' incasso. Genova, li 31 Agosto 1889.

BANCA DI GENOVA.

l'Amministratore, GUETANA PASTELLA. *Il Direttore*, COBRAD.

Il Gerente dell' Ufficio Marittimo.
C. SMITH.

Paguese a la Orden del Señor Francis Peabody valor en cuenta. Buenos Aires, 20 de Noviembre 1889.

GERENTE DEL BANCO DE ITALIA
Y RIO DE LA PLATA.

M. BATTERIJ, *Contrador*. CROMASE.

Banco de Italia y Rio de la Plato No 20156 Buenos Aires.

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

THE ELIZA LINES.

Nos. 3549 and 3550.

AGREEMENT.

[FILED IN CIRCUIT COURT, JULY 1, 1892.]

It is hereby stipulated and agreed that the following articles from the Norwegian Law of Navigation, dated 24 March, 1860, viz., Arts. 95, 96, 97, 98, 99, 101, 106 and 108, shall be printed and made part of the record in said cases. And it is further agreed that due and adequate proof of said Norwegian Law of Navigation was made in the District Court, at the trial of said cases, and that the above-named articles constitute all of said Norwegian Law of Navigation deemed material, by either party, at the trial of said cases in this court.

PART IX. Concerning loan on ship, freight and cargo under bottomry or otherwise.

ART. 95. If, in consequence of sea damages, capture, scarcity of provisions by reason of an unusually long voyage, or any other unforeseen event, the funds which the master has in hand for his owner's account are insufficient for the continuation of the voyage, and if there be no means of communicating with the owners, the master shall either endeavor to obtain the money by pledging his owners' personal credit, as for instance, by drawing a bill of exchange on them, or on their agents, or he shall, if possible, address himself to the owners or agents of the cargo, requesting them to advance on the freight and on the other expenses chargeable to the cargo the amount which may be necessary for the continuation of the voyage. If it is impossible to obtain this amount by any of the aforesaid means, and if there is no other and cheaper way open to the master, as, for instance, that of selling the goods of the owners at a reasonable price, the master is entitled to borrow the money on bottomry.

ART. 96. The amount of the bottomry premium is not restricted to the ordinary rate of interest.

ART. 97. Bottomry may be taken on the ship, freight and cargo; it is, however, incumbent on the master to restrict the loan to a bottomry on ship and freight alone, if the money is intended for expenses chargeable to the ship; but if, on the contrary, the expenses to be incurred concern exclusively the cargo, he is entitled to take

bottomry on the cargo alone. If any of the interested persons furnishes the amount that falls to his charge, his share in ship, freight or cargo cannot be made subject to bottomry, unless it is impossible otherwise to obtain a reasonable loan.

ART. 98. The bottomry bond shall state: the amount of the principal of the bottomry debt and of the bottomry premium agreed upon, the objects hypothecated by the bond, the voyage for which the transaction has been concluded, the place where the payment shall be made, and all other conditions upon which the parties have agreed. Should several copies of a bottomry bond have been issued in each of them the number of such copies has to have been stated, and when one has been paid, the others are null and void.

ART. 99. The bottomry creditor can enforce his claims only to the extent of the value of the objects made subject to bottomry, unless the owner, master or shipper, by reason of any special circumstance, has incurred a personal responsibility. Consequently, the bottomry creditor loses his claim according to the bond if the objects referred to in the bond are lost during the voyage in consequence of sea damages, fire, capture, or other accidents. If an article subject to bottomry is sacrificed under such circumstances as constitute a general average loss, the bottomry creditor enters into the right of compensation resulting therefrom

ART. 101. Contribution to a general average loss has the same privileges as bottomry. These claims, whether bottomry claims properly so called, or those which rank as such, are classed according to their date, so that the more recent claim has precedence over any of an earlier date, whilst those arising simultaneously have equal rights. However, bottomry claims and those classed as such rank after; (*a*) award for salvage, as well as pilotage and other expenses, which at the port of destination are chargeable on the objects subject to bottomry; (*b*) the wages of the master and the crew, according to Art. 37. The claims mentioned under letter *a* have precedence over those contemplated under letter *b*. An ordinary lien on ship or cargo ranks after bottomry and other claims mentioned in the present article.

ART. 106. If, in order to avoid a bottomry loan for the continuation of the voyage, the master has advanced money of his own, or incurred any obligation, either by drawing a bill of exchange, or otherwise, he has as security for his claim on the ship owners a lien, ranking as a bottomry bond, on ship, freight and on the cargo, if the latter belongs to the owner of the ship. The same rights are accorded to the master in respect of a bottomry bond, which he has paid out of his own funds, provided it be obligatory for the owners. The lien upon ship, freight and goods, to which, according to the above provisions, the master is entitled, may, in case of the loss of these objects and of the failure of the owners, be extended to the sums for which they are insured, unless the latter are already dis-

posed of in a way binding for the insolvent estate. If the claims mentioned in this article are not enforced within six months after the return of the ship to the port of registry the privileges attached to them become extinct.

C. T. & T. H. RUSSELL,
Proctors for Libellant.
JOHN LOWELL,
EDWARD S. DODGE,
For Claimant.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

OCTOBER TERM 1893.

No. 3545, THE ELIZA LINES,
No. 3546, THE ELIZA LINES,
No. 3547, CARGO EX THE ELIZA LINES,
No. 3548, ANDREASEN, LIBELLANT, APPELLANT.

v.

295,000 FEET OF LUMBER AND DARRAH ET AL.

No. 3549, THE ELIZA LINES,
No. 3550, THE ELIZA LINES.

OPINION OF THE COURT.

April 3, 1894.

PUTNAM, J. All the various proceedings with which this opinion is entitled, constitute in substance but one case. They relate to the distribution of the proceeds of one vessel, her cargo and freight. None of them can be wholly disposed of without having regard to one or more of the others. The court has the power to consolidate them, and will do so. All the proceedings will be carried along, disposed of and recorded in this court as a single cause, under the title of "The Eliza Lines, her Cargo and Freight." Rev. Stat. sec.

921; *The North Star*, 106 U. S. 17, 26; *Rogers* v. *Hurray*, 4 Cliff. 582, 590; Williams & Bruce's Admiralty Practice, 2nd ed. 386.

Cases consolidated may be tried together or separately as the court may determine. *The Dove*, 91 U. S. 381, 383. But, if tried together, the court must be careful not to apply evidence taken before the consolidation, to any issue with reference to which it was not taken. *The Demetrius*, L. R. 3 A. & E. 523. The court thinks there is no difficulty of that character in the matter at bar, inasmuch as it believes that it will be able to proceed upon facts which are not disputed, or which are supported with reference to each issue by evidence made pertinent thereto by stipulation.

This vessel was a Norwegian bark. Hans Andreasen of Farsund, Norway, was master and owner of one-third. The other owners were numerous, living in and about Farsund, and the managing owner was Davidsen, also residing at Farsund. There was telegraphic communication between Farsund and Pensacola, where we find the bark when her immediate history commences. She arrived there July 1, 1889, under a charter to James E. Ward & Co. of New York, to carry lumber from Pensacola to Montevideo, for orders to discharge there or at Buenos Ayres. Freight, as usual, was payable on delivery of the cargo at the port of discharge. The vessel was laden at Pensacola with hard-pine lumber, and sailed August 13, 1889. She soon afterward encountered heavy gales, and was finally abandoned by her officers and crew, who were taken off by another vessel and carried to Port Maitland, Nova Scotia. At the time of her abandonment she was in the neighborhood of Georges Banks. There she was found derilect by the original libellant, William W. Black, and his associates, and brought into Boston, September 19, 1889, in the exclusive possession of the salvors.

Immediately on being advised that the bark had been brought into Boston, Captain Andreasen came there from Port Maitland, bringing with him his two mates and steward, but not the crew, and arriving the evening of Saturday, September 21. Finding her in condition to pursue her voyage after repairs, Andreasen prepared himself to release the cargo and vessel; but each remained in the actual possession of the salvors until they filed their libel for salvage against the bark, her cargo and freight, September 26, 1889, this case now being No. 3545, and by cross appeal, No. 3546, and hereafter in some instances styled the original cause.

Thereafterwards, the vessel was released to Andreasen on stipulation, and she was ready for sea at least as early as December. Meanwhile, Andreasen acted in behalf of the vessel with all the promptness which the law could require; he made his formal claim for the vessel and cargo September 27, and therein prayed for delivery of both to him on giving such stipulation as the court should direct, and he gave the stipulation for the vessel October 5, at the agreed valuation of $2,800, afterwards reduced to $2,250.

September 27, Bernard Darrach filed a consolidated claim and application for possession of the cargo, setting out that James E. Ward, Henry P. Booth and William H. T. Hughes, doing businesss in New York as co-partners under the style of James E. Ward & Co., were the owners of the cargo, and that Darrach was authorized by them to make claim in their behalf, and closing as follows: "And whereas said cargo was totally abandoned at sea by the master and crew of said bark, and the contract of carriage and lien for freight thereby abandoned, broken and waived, the said Darrach, in behalf of said owners of cargo, prays that this Honorable Court will order said cargo to be delivered to him, upon his giving such stipulations therefor as the court may order, without the payment of any freight."

This claim being made by an agent, it was sworn to as required by Rules of Practice in Admiralty, No. 26.

October 18, 1889, Ward, Booth and Hughes, as such copartners, filed in the same court a formal libel, now No. 3547, setting out in substance that they were the owners of the cargo; that the vessel had been left derelict with her cargo; that they were brought into Boston by the salvors, and libeled for salvage; that the cargo was then in the custody of the court, and had been unladen; that the libellants were ready to pay, and offered to pay, whatever should be awarded as salvage, and wished to take possession of it at Boston; and that the master of the vessel claimed that he was entitled to the possession of the cargo, for the purpose of carrying it to Montevideo. Thereupon the libel prayed process against the cargo, and that it might be delivered to the libellants, and for such other and further relief as law and justice might require.

As Andreasen had already, September 27, in the original cause, filed his application for possession of the cargo, and the cross application of Darrach had been filed on the same day, and there had been the cross proceedings of October 18, elsewhere described, whatever might have been the proceedings on the libel filed by James E. Ward & Co,, the respective positions of each party in interest was seasonably known to the other, and in form to be disposed of.

November 27, Andreasen filed in response to the libel of James E. Ward & Co., a claim to the cargo. This was followed by an answer, November 29, 1889, setting out substantially the same matters alleged by him in his petition filed in the original cause October 18, hereafter explained. He concluded his answer with a prayer that the libel be dismissed, and that the cargo to delivered to him, as prayed in his claim filed in the other suit.

February 27, 1890, the proctors of James E. Ward & Co.,

filed a motion to dismiss their libel, for that the court had already ordered the cargo to be sold. January 16, 1891, the motion was allowed, and it was decreed that the libel be dismissed as of November 19, 1889, the date of the warrant for the sale of the cargo hereafter explained. January 24, 1891, Andreasen appealed from the last named decree.

October 18, 1889, Andreasen filed an application in the original cause, setting out among other things the substantial history of the case, that he was making repairs and was about to complete his voyage to Montevideo, that he had a lien on the cargo for the carriage thereof, and desired to carry the same and earn the freight, and that he was ready to pay the salvage on the cargo and carry it to its destination, and demanded the right to do so; and he closed by praying that the court would order the cargo delivered to him on his giving a proper stipulation therefor. On the same day James E. Ward & Co., not having to that time apparently pursued their application for delivery of the cargo made September 27, filed in the original cause an application, setting out that the value of the cargo was being rapidly diminished by reason of the charges of custody and other costs and expenses, and praying for an interlocutory sale. There was no allegation that the cargo was perishable, or liable to deterioration, decay or injury, as provided in Rules of Practice in Admiralty, No. 10. Neither did the salvors apply for a sale. On the sixteenth of November the formal petition of Andreasen to bond the cargo, filed on the eighteenth of October, was denied, and its sale was ordered, and accomplished on the twenty-ninth of November.

The sale of the cargo was not a sale for necessity under the Rules, No. 10, already referred to, nor as a matter of right or necessity for the purpose of ascertaining how the salvors' services were to be computed, if the salvors had such

right. *The Ship Nathaniel Hooper*, 3 Sum. 542, 552, 563. If a sale had been made for any such reason, the voyage would clearly have closed as the result of a physical or legal necessity, and all averages, general and particular, would necessarily have been adjusted at the port of Boston. But the cargo was not perishable. The sale was made on the application of James E. Ward & Co., by virtue of the general authority of an admiralty court, which adjusts itself to all contingencies of maritime affairs, and which, looking only at the interests of one of the parties involved, and to prevent them from being sacrificed by a peculiar combination of circumstances, may, perhaps, in an extreme case decree a sale on his request. The sale in this case can be justified on that principle only. It must be held to have been made on the application of the owner of the cargo, not for the common interest, but for his own alone. Under such circumstances, and indeed under any circumstances where a sale has been made on the application of either party, the court on appeal, in the absence of any proceedings for prohibition, can grant no direct relief, even if it finds the sale was unauthorized. It can only assume that it was made in the interests of the party applying for it, and that, under some circumstances, he subjects himself to the equitable consequences thereof. On a sale of any part of a cargo in a foreign port by authority of the admiralty, if it transpires that the owner ought to have had funds in that port, or was otherwise in fault, then, notwithstanding the sale was by an order of the court, the master, by applying for and securing it, subjects his vessel to a liability on the bill of lading. *The Schooner Tilton*, 5 Mas. 465, 474. Unless the proposition is maintained that the voyage was wholly broken up by the derelict, did not James E. Ward & Co., by preventing the master from obtaining possession of the cargo, and by applying for and securing the

sale, subject themselves to a liability for payment of the cargo's proportion of all just averages, and of either *pro rata* or net freight? This question we find it convenient to dispose of here, although by so doing we interrupt the narrative of proceedings.

The general powers of the admiralty courts in making sales of property, independently of the physical necessity arising from its perishable character, are stated in Parsons on Shipping and Admiralty Law, vol. 2, page 574; *The Fanny and Elmira*, Edw. A. R. 117; *The Schooner Tilton, ubi supra*; *The Gettysburg*, 5 Asp. 347; and Benedict's Admiralty Practice, 3rd ed., Sec. 299. The court does not say that these authorities, or any other, justified the sale of the cargo of The Eliza Lines under the circumstances of the case; it does not find it necessary to determine that question. On the other hand the court is clearly of the opinion that by reason of the principles stated, and by authority, this sale, made on a summary order and without plea or proof, or judicial decree on an issue solemnly made, cannot prejudice the interests of any party not assenting to it. A full report of The Kathleen, which will be referred to more at length hereafter, will be found in 2 Asp. 367. The vessel had been abandoned and brought in by salvors, and the owners of the cargo applied for its sale. It was ultimately determined that the cargo was discharged from all further liability to the ship; but on the preliminary application for the sale this point was left open. In the report in 2 Asp. page 368, the learned judge, Sir Robert Phillimore, who disposed of the case through all its stages, inquired as follows: "What is the legal consequence of obtaining from the court an order for the sale of the cargo? Does it not oblige the owners to pay either full or *pro rata* freight?" This question indicated that as his mind was then shaped, the granting of the order for the sale did not dispose of the question of liability for freight; and,

indeed, that both the learned judge and all the counsel so viewed the law, necessarily follows from the fact that afterwards in the same case, on a subsequent application in behalf of the owners of the vessel, he considered this question and settled it on the merits.

Can it be possible that an interlocutory order of this character, summarily made without proper plea and proof, only for relieving the court of the custody of property, or for securing a fund in the registry to represent it, or for some other incidental purpose, and from which no appeal could be taken effectual to give complete remedy if the order was erroneous, and which is occasionally made before all parties are in court, can be held to determine the ultimate rights of the parties on the questions which we are now considering? According to the necessary principles of justice and the fundamental rules of orderly proceedings in courts of law, we must hold that it does not.

When the cargo is of a perishable character, and would be endangered by some unexpected delay resulting from maritime disaster, or from some other cause, it may become the duty of the master to land it and sell it, although it might have arrived at the port of destination *in specie*. *Jordan* v. *The Warren Insurance Company*, 1 Story, 342; *The Isabella Jacobinca*, 4 Rob. 77; *The Industrie*, (1894) P. 58, 75. Under these circumstances, if the master refuses to sell, the admiralty courts might, perhaps, sell or deliver the cargo to the owner, without charging the owner with liability for freight. But on the whole, we think the owner who obtains delivery of the cargo, or, what is equivalent, obtains the possession of the proceeds after a sale made solely in his own interest, cannot avoid any liability merely because he has accomplished this through the medium of an interlocutory and perhaps *ex parte* order, from which there is no appeal which can afford a

substantial remedy if the order proves erroneous. In this event he must stand the same consequences as though he had accomplished immediately by his own act, what he succeeds in accomplishing mediately by himself setting the court in motion.

On the twenty-sixth day of November, ~~in the original cause~~ in the original cause, Darrach again applied to the court, and prayed that the claim filed by him on the eighteenth day of October, might be amended by substituting the Atlantic Mutual Insurance Company for James E. Ward & Co. as the claimant of the cargo, and that it might stand as the claim of said corporation. This was allowed on the twenty-seventh day of November; but this allowance was ineffectual, because the Atlantic Mutual Insurance Company has never submitted itself to the jurisdiction of the court. Until that should be done, James E. Ward & Co. stood for all for which they would be holden to stand independently of this last application. No court can permit one suitor to withdraw on substitution to the detriment of the other parties to the cause, until it can put its hands on the person to be substituted. By their prior intervention and claim, they declared themselves owners of the cargo and estopped themselves from denying that they were. If thereby they subjected themselves to a liability to other parties, they could not transfer this liability without the latter's consent. The court therefore strikes this application from the record as unimportant.

On the twenty-seventh day of November, 1889, Black filed a petition on his original cause, against James E. Ward & Co., praying that they might be required to pay the gross freight into court, the details and history of which are not now important.

On the sixteenth day of January, 1891, by leave of the court, Black filed, as of November 27, 1889, a renewed appli-

cation that James E. Ward & Co. should pay the freight money into court, or file a stipulation therefor. On the same day this motion was disallowed as of said twenty-seventh day of November.

On the same twenty-seventh day of November, Andreasen filed a libel against the cargo, Darrach and James E. Ward & Co., now No. 3548, setting out many of the facts which have already been recited, and especially the efforts made by Andreasen to secure the cargo, that Black had filed the libel in the original cause, that Darrach, in behalf of James E. Ward & Co., had filed in that cause a claim to the cargo, and that James E. Ward & Co. had filed their libel already referred to. He prayed for process against the cargo, a monition to Darrach and James E. Ward & Co., and for a decree for payment of freight and general average. On this libel a warrant and monition issued on the same day, and was ordered to be served, and was served, on the proctors who had already appeared for James E. Ward & Co. in the original cause, and one of whom appeared for them on the libel instituted by them. On the sixth of December the same proctors moved that this libel be dismissed, on the ground that none of the persons against whom it was filed were residents of the district and that no sufficient service had been made. On the sixteenth day of January a decree was entered dismissing it as against Darrach and James E. Ward & Co., but allowing $1,450 *pro rata* freight, to be paid only from the proceeds of the cargo in the registry, and referring all questions of general average to an assessor. The report of the assessor was made and filed, and a decree entered, on the fourteenth day of May, 1891, reaffirming the dismissal as against against Darrach and James E. Ward & Co., and determining that the proceeds of the cargo had been diminished by several decrees awarding salvage and moneys due upon the bottomry

bond, to be hereafter referred to, so that there remained thereof only the sum of $157.23, directing that this last sum should be paid the vessel, and disallowing all claims for general average. Whether the dismissal as against Darrach and James E. Ward & Co. was on the merits, or for supposed want of jurisidiction over them, does not appear. From this an appeal was duly taken by Andreasen.

Turning again to the original libel of Black for salvage, an answer was filed by Andreasen on the same twenty-seventh day of November, admitting that salvage was due, and submitting the amount thereof to the court. The result of this was a final decree, entered on the thirteenth day of May, 1891, to the effect that the $910.74, net proceeds of the cargo in the registry, must be wholly applied to the satisfaction of the *pro rata* freight, subject to the lien for the salvage, awarding Black $1,755 for salvage services and expenses, and $310.06 for costs of court, and apportioning the two *pro rata* between the bark, at a valuation of $2,250, and the $910.74. The disposition of the remainder of the $910.74 will be hereafter explained.

Both the salvors and Andreasen seasonably appealed, each expressly coupling an appeal from all interlocutory orders and decrees. These appeals are now Nos. 3,545 and 3,546.

Another libel was filed by the Banque De Genes on the seventh day of December, 1889, against the bark and her freight, based upon an alleged bottomry bond or lien for moneys advanced, the circumstances of which will be stated in connection with the consideration of that claim. This resulted in a decree entered on the thirteenth of May, 1891, to the effect that the libellant was entitled to recover against the bark and freight $1,458, with interest from the date of the libel, amounting in all to $1,582, and costs of suit, that the same should be paid out of the appraised value of the

bark and net freight, after deducting salvage and costs, but giving the libellant only a proportion of the balance. In other words, it compelled the libellant to contribute with the owners of the vessel and freight. Both parties seasonably appealed from this decree, and these appeals now make Nos. 3549 and 3550.

The issues with the Banque De Genes relate to a bottomry, placed on both freight and vessel at Pensacola on the twenty-fourth of July, 1889. The District Court maintained the validity and payability of the claim; but, as already stated, it allowed the holder of the bond only a proportion of the net salvage. Andreasen, in behalf of the bark, contests the entire claim on every ground that can be suggested. His answer is not creditable to him, in that it raises so many issues inconsistent with his own conduct at Pensacola and his testimony.

The vessel arrived at Pensacola on the first day of July. The charter-party, which required her to take up her cargo at Pensacola and furnished her with no advance freight, was made in New York, not by Andreasen, but by the agents of the owners, on the fifth day of the previous February. It described the vessel as then on a voyage to Buenos Ayres; and in view of the length of time which elapsed before the vessel could arrive at Pensacola, the owners, including the managing owner at Farsund, must be assumed to have known that it would be several months before ~~the vessel~~ she would load under the charter party, and that there was ample time to supply the needed funds to pay her outward bills. In fact Andreasen admits in his testimony that he received one or two letters from his owners while he was at Pensacola; and though he arrived there on the first day of the month, he did not take up this bottomry until the twenty-ninth. He also testified that the vessel arrived from Buenos Ayres in ballast, that his owners knew that he would collect no freight on arrival, and also knew that it would be necessary for the vessel to borrow money in Pensacola. He also testified that he had no funds of his own, and that he used the money in part for provisioning the bark and for her other disbursements, and in a small part for his own cash and the crew. The

amount taken up, £300, netting the master $1353.60, would necessarily appear to any court of admiralty a reasonable amount for inward and outward disbursements for a vessel of the size of The Eliza Lines. There is not a syllable in the record impeaching the transaction, except it is the testimony of Andreasen that he failed to communicate with his owners in advance. In this case this omission was immaterial. The amount taken up was moderate, at a fair rate of maritime interest, and covered only the ordinary port disbursements. The transaction was touching the ordinary course of the management of the vessel, with reference to particulars which the owners foresaw, and could easily have provided for otherwise if they had so desired. The cases familiar in the decisions arose from unforeseen disasters, involving large amounts at remote points, where the lenders of money were few and could make their own terms, and all under circumstances which the owners could not anticipate nor provide for. It is this class which the courts have considered, when laying down so strictly the rules requiring prior communication with owners.

In the case at bar, independently of any questions concerning the peculiar law of Norway or of the United States touching bottomry, and of any questions whether the law of the flag or that of the place of making the loan governs, the fundamental rule applies which exists under all laws, that when an agent has been selected to perform a duty at a remote place, if then the principal has not provided what must have been foreseen as requisite to its full performance, the principal impliedly authorizes the exercise of such powers as are incidental to supplying the deficiency. Therefore, the circumstances of this case, by implication, devolved on the master the power to obtain funds, and to exercise his discretion within reasonable limits as to the most suitable way of obtaining them. It is well said in Abbott's Law of Merchant Shipping, 13th ed. 169, that it is obvious that to a ship-owner who knows that his ship is in distress and has no funds, notice of the distress may often be notice of the necessity of hypothecation. Moreover, in this case, the master was part owner; and he admits in his testimony that after he had drawn

the money, he informed the other owners that he had done so, and advised them of the amount. Andreason was estopped, and the other owners do not appear to have objected after having been informed. Aside from the implication arising from this negative fact, there is enough in the case to justify the inference that they were very glad not to object, because Andreasen himself was bound for the amount obtained if the bottomry was invalid, deducting, perhaps, the premium in excess of the customary rates of interest; and for his liability he would have had, according to the Norwegian Code printed in the case, a *pro rata* reclamation against the other owners *in personam*. Assuming the bottomry to be valid, the owners are relieved from personal liability, which, according to all the aspects of the case, is to their advantage. No one objected to the bottomry until the litigation commenced. It was authorized by the circumstances of the case without any prior communication with the owners, and has been ratified by their silence; and as it is in their interest, it may also be presumed to have had their approval.

A question was raised whether or not the advance was on bottomry, or only on the general credit of ship and freight. The libel makes the written agreement on the strength of which the loan was made, a part of it, and also alleges that the money was furnished on the credit of the bark and freight. As the libel sets out all the facts, and no exceptions have been taken, it is immaterial whether it construes the transaction correctly or not. The court can determine from what is alleged whether there was a proper bottomry, or only an obtaining of money on the credit of the ship and freight. It is clearly of the opinion that the former represents the state of the case. The court will not set out the documents at length, but they contain, first, an application for a loan on the freight to be earned on the then voyage from Pensacola to Buenos Ayres. This is followed by a note, signed by Andreasen as master, promising to pay "fifteen days after arrival at the port of destination, or other intermediate port at which shall end the voyage." It also contains an hypothecation of the ship and freight, and an express assignment of enough of the present freight to cover. Connected with these papers

is what is entitled "Rules for loans on freight," also signed by Andreasen, which among other things provides that the freight and vessel shall be liable for the payment of the loan. This sums up all the essentials of a bottomry loan, the most important of which are that the owners are discharged, and the loan is not payable, unless the vessel arrives; but, of course, with the necessary implication that if the vessel does not arrive, the bottomry is entitled to the salvage which comes into the owners' hands. Such was the result of the present case, happening through the vessel being arrested at Boston, bonded by the owners, and subsequently sent by them on another voyage. There is no doubt, according to well settled rules applicable to bottomry bonds, that the District Court was right in holding that this bond was of that class, nor that in view of the deviation after her arrival at Boston, it became a lien on the net salvage of the vessel and her freight.

We are referred to the decision of the Circuit Court of Appeals for the Second Circuit, in *The Sophie Wilhelmine*, 58 Fed. Rep. 690, to the effect that on papers constituting a bottomry loan substantially of the form before the court here, the lien did not extend beyond the salvage of the freight, and did not hold the vessel. There ~~are~~ were some expressions in the instrument before the Court of Appeals in the Second Circuit which perhaps might distinguish it from the one at bar; but we are not disposed to look for minute differences of that character. Twice over in the papers before this court the borrower pledged both vessel and freight; and in our view, we would not be justified in annulling this express stipulation of the parties. There is no doubt that the loans in that case and in the case at bar were, commonly speaking, loans on freight, such as is customary, especially on the short voyages in the Atlantic commerce. Such loans are more desirable for the lenders than loans on the hull, because the freight is ordinarily collected with great promptness and certainty. But however this may be, neither the lender nor the borrower is prohibited by any principle of law from taking or furnishing additional security, by pledging the hull, or in any other like way. Parsons on Maritime Law, vol. 1, 420. That was what was expressly done in this case; and though no

doubt, if the freight was sufficient and there were conflicting interests between the freight and the hull, or the underwriters on each, the freight would be holden to exonerate the hull, yet until the amount of bottomry was made good, the parties had expressly bound both.

In connection with this branch of the case, the court must not overlook the point taken by Andreasen, that the Norwegian code prescribes various minute particulars for the form of bottomry bonds, among the rest that the premium agreed on must be stated, which the case at bar does not meet. But there is a wide distinction between provisions which are fundamental, relating to the powers of the master, and those which are merely directory as to minute details of form. It would also be going very far to suppose that the latter were more than municipal regulations touching transactions within the kingdom of Norway itself. Moreover, all such details were expressly waived by Andreasen, so far as his interests was concerned, by his executing the bottomry, and impliedly waived by the other owners through their silence after being advised of the transaction.

It is for the interest of commerce that bottomry bonds given under circumstances like these at bar, should be liberally protected, and courts are not inclined to the class of inequitable defences thereto set up in this case. *Insurance Company* v. *Gossler*, 96 U. S. 645, 651.

As already said, the District Court apportioned the net salvage between the bottomry bond, the vessel and freight. The court understands that under the French law at one time, and perhaps even now, bottomry contributed and shared in general average, and in some other particulars; but elsewhere, and in this country, so far as the court is advised, the practice is without exception, that bottomry does not contribute, except to the expenditures of the owners from their own funds for bringing the wreck into port, or providing for its preservation; and towards these it contributes the entire amount, so far as necessary to reimburse the owners, and so far as the salvage was benefited by them. The principle is stated in Parsons on ~~Maritime Law~~ Shipping and Admiralty, vol. 1, ~~152~~ 157, to the effect that no

salvage or average rests upon a bottomry bond, unless there is an express stipulation to that effect; and the court understands the same to be held in *The Great Pacific*, L. R. 2 P. C. 516, and in Abbott's Law of Merchant Shipping, 13th ed. 176. To the same effect is *Insurance Company* v. *Gossler*, 96 U. S. 645, 652, 655.

As the result of these rules, and for other more fundamental reasons, the bottomry cannot have the benefit of the repairs made to the bark at the port of Boston; because if it did, the benefit would at once be offset by the liability of the bond to contribute to the owners the cost of those repairs, and the law does not require computations which are vain and neutralize each other. The court does not consider what the condition of the law on this point would be, if the deviation at Boston had been voluntary on the part of the owners.

The result is that the holders of the bottomry bond must have a decree against the whole of the existing net salvage of vessel and freight, and against such further sums as may be received from James E. Ward & Co., as we will explain hereafter.

The circumstances are not such as to justify the court in reviewing and modifying the findings of the court below with reference to the amount of salvage awarded, which Black claims is insufficient; except if additional freight be secured from James E. Ward & Co., the salvors should receive their due proportion thereof.

Inasmuch as Darrach clearly set up no interest on his own behalf, but throughout appeared only as the agent of James E. Ward & Co., the court will order that Darrach be dismissed from the consolidated case.

The next difficulty with which the court has to deal relates to the question of jurisdiction *in personam* against James E. Ward & Co., and, incidental to that, the objections that the libel filed by Andreasen in No. 3548, against the cargo and them, cannot be maintained, because, as it is claimed, in a libel of that character the cargo and the owners of the cargo cannot be joined.

There can be no doubt that the paper filed by James E Ward & Co., September 27, 1889, in the original cause, in which they alleged title to the cargo and prayed for delivery of it to them without payment of freight, was an intervention, and propounded allegations

within Rules of Practice in Admiralty, No. 34; and thereupon, in accordance therewith, they might have been required to give a stipulation with sureties to abide the final decree. So, also, on the filing, November 27, 1889, of the cross-libel by Andreasen, James E. Ward & Co. as respondents in the cross-libel, if the service was sufficient, might have been required to give security for the sum claimed in the cross-libel, as provided in the same Rules, No. 53. The record does not show any such stipulation in either cause. A motion that a stipulation be given by them in the original cause was filed on the sixteenth day of January, 1891, and, by leave of court, as of November 27, 1889; and on the same day the motion was disallowed, on what precise ground does not appear, nor is it necessary to consider. Notwithstanding this, by their intervention and by filing their libel, James E. Ward & Co. became personally bound to abide the decrees in the original cause and on the cross-libel, to the same extent as they and their sureties would have been bound if the stipulations had been given.

With reference to the original cause, however, it must be said that no intervener, merely by intervening, would become subject to perform a positive obligation, or liable in that cause to a counter claim or other claim against him. If any such is to be enforced, it must be by a cross-libel, or, at least, by a further intervening petition, having all its merits. *Ward* v. *Chamberlain*, 21 How. 572, 574. The cross-libel is found in that filed by Andreasen, November 27, and the further intervening petition is that of Black filed in the original cause on the same day. The difficulty touching this petition is that it was filed by Black only in behalf of himself and his associates, and not in behalf of the master or owners of the vessel, and therefore the latter can now claim no interest under it. We are compelled, therefore, to look to the cross-libel filed by Andreasen in No. 3548. As this related to the subject matter of the original suit, and involved the disposition of a part thereof, it may properly be regarded as a cross-libel consequent on it; so that service on the proctors of James E. Ward & Co., who had appeared therein, was sufficient to give jurisdiction, both on general principles applicable in all tribunals touching cross-libels, and also

on account of the obligations to which James E. Ward & Co. subjected themselves personally by intervening in the original cause, and by filing their own libel, as already explained.

But the matter may be pursued somewhat further. We have already referred to the libel filed October 18, 1889, by James E. Ward & Co against the cargo, and to Andreasen's answer to it, in which he prayed that the libel might be dismissed. We have also referred to the motion to dismiss that libel, and to its final disposition by dismissal. From that, as already said, Andreasen entered an appeal, now No. 3547. It is claimed that this appeal cannot be sustained, because in dismissing the libel the court complied with the prayer of the answer. This may be true; nevertheless, the proceedings in this case remain as the basis for jurisdiction in the cross-libel of Andreasen. This, as already said, was filed November, 27, 1889, and was made, not only in substance but in terms, a cross-libel as to each of the prior suits, by setting out the original cause and also the libel of James E. Ward & Co. against the cargo. On this no process issued against the cargo or its proceeds; but a warrant and monition issued on the twenty-seventh day of November against all persons concerned, with a special direction that it be served on the proctors for James E. Ward & Co. named in the monition, one of whom appeared for them to prosecute their libel, and both in their intervention in the original cause. Service was duly made on the proctors named. On the sixth day of December, they moved to dismiss, as already stated, and on the sixteenth day of January, simultaneously with the decree dismissing the libel of James E. Ward & Co., an interlocutory decree was entered on the libel of Andreasen, dismissing it as against them, but retaining it as against the net freight.

It should be remarked at this point that the decree dismissing the libel of James E. Ward & Co. did not carry with it the libel of Andreasen, whether it is to be regarded as a cross-libel to the original cause and to that of James E. Ward & Co. or only to the latter. Andreasen, in his libel, as already explained, set up a counter-claim against James E. Ward & Co., which, although it grew out of the subject matter involved in the prior proceedings,

and was capable of being properly consolidated with them, and so was properly the basis of a cross-libel, yet it was far from being in the nature of a mere defence. The distinction is well stated by Judge CALDWELL in *Lowenstein* v. *Glidewell*, 5 Dill, 325, 329. The fact that the libel of James E. Ward & Co. having enabled the libellant in the cross-libel to obtain jurisdiction by service on their proctors, its result was not of importance as affecting the standing of the cross-libel. This was well explained as a rule everywhere, in *McGowan* v. *Middleton*, 11 Q. B. D. 464, 468, 471, 472. Indeed the decree dismissing the original libel, or bill, may itself be the very foundation, and a part, of the decree sustaining the cross-bill or cross-libel, as was the case in *Holgate* v. *Eaton*, 116 U. S. 33, 42. The rule on this point in admiralty must be even more liberal than in equity, as the former regards mere matters of form even less than the latter, and is even more disposed than the latter to adjudicate whatever rights come before it, when jurisdiction has once attached, so far as they can be justly adjudicated.

James E. Ward & Co. refer to the fact that Black's petition and Andreasen's libel were each filed November 27, and that this was the same day that they moved to substitute the Atlantic Mutual Insurance Company; but in no event was this of any consequence, as their motion to dismiss their own libel was not filed until February 27, 1890. As already said, the appearance of at least one of their proctors stood in the latter case, at least until the latter date.

Therefore the only question on this branch of the case is whether, under the circumstances, the service on the proctors of James E. Ward & Co. gave jurisdiction over the latter on the libel of Andreasen. Until the issue was made in this case, the court had supposed there was no doubt on this question. Whenever a libel in admiralty or a bill in equity is filed by a non-resident, so far as the court is advised, the practice has been uniform to direct and permit service of a cross-libel or cross-bill on the solicitors or proctors of the non-resident. In no other way can jurisdiction be obtained to adjudicate all the rights which the court ought to adjudicate touching the subject matter of the proceeding. The original promoter of the litigation by coming into court submits himself, by

implied agreement, to service made in that manner, and by consequent implication vests his solicitors or proctors with authority to receive the service of the precept issued on the cross demand. Indeed the rule goes so far, that in many jurisdictions in the United States, if not in all of them, a like service may, according to the modern practice, be made of a counter suit on a mere counter demand, not connected with the subject matter of the original suit, and although the only purpose is to obtain a set-off, either of the judgments or executions.

The court has carefully examined all the cases cited on this point on either side, and finds none of them pertinent, except so far as some of them may be hereafter referred to. If there are remarks contained in any of them which bear on the present question, they have been overlooked by the court, because they were not necessary to the issues in the case, were mere dicta and have not been brought carefully to the court's attention. In *Nichols* v. *Tremlett*, 1 Sprague, 361, cited in behalf of James E. Ward & Co., a substituted service of a so-called cross-libel on the proctor of the original libellent was refused; and the court resorted to the power vested in the admiralty courts, recognized by Rules of Practice in Admiralty, No. 53, and stayed the original cause until an appearance was entered in the so-called cross-libel. The matter does not seem to have been thoroughly discussed, and is not very fully stated. The learned judge admitted the analogy to proceedings in equity. Whatever may have been the extent of the discretion practiced by equity courts at the time of this decision in 1857, under the present practice it embraces all cross-bills properly so-called. There was no suggestion in Nichols v. Tremlett this case that the authority given by the Rules, No. 53, to stay the original libel until a stipulation is given in the cross-libel, was regarded as excluding the power of the court to order substituted service. That this is only cumulative is supported by Williams' & Bruce's Admiralty Practice, 2d ed. 370, note (t). The admiralty court act of 1861, vested by express law the same power to stay proceedings as is recognized by the Rules, No. 53; and yet in the note referred to, the learned authors say touching the decisions since this statute, that service of a citation in a cross

cause on the solicitor of the party suing in the original cause would be sufficient. The power to stay is not one to administer justice, but to deny it; and such a power should not be deemed exclusive of others, unless impossible to come to some other conclusion.

Many authorities on this general question will be found in Daniell's Chancery Practice, 5th ed., *446, *449. As the practice stood at the date of this edition, service on a solicitor in an original cause was not allowed on a cross-bill, but only on a bill filed to restrain an action at law. The notes, however, cite cases showing great fluctuations in the practice of the equity courts, which can only be accounted for on the distinction between the discretion of the court and its powers. In *Hobhouse* v. *Courtney*, 12 Sim. 140, appears a group of instances of substituted service, which demonstrates that, in the view of many chancellors, the power of the court was far beyond anything in the practice stated in Daniell. The most striking example of this is *Hope* v. *Hope*, 4 DeG. M. and G., 328, referred to by Daniell as extending the practice. In this case Mrs. Hope, who was then residing in France, had commenced through her solicitors in the Ecclesiastical Court proceedings against her husband to obtain a divorce. It appeared that by the French practice, which was the law of her residence, questions as to the custody of the children were dependent upon, or at all events connected with, divorce proceedings. Thereupon, the children having filed a bill in chancery to secure their removal from the custody of their mother to that of their father, the Master of the Rolls ordered service to be made upon her solicitors in the divorce proceedings, which Lord Cranworth, the Lord Chancellor, sustained. It is very noticeable that, on page 341, the Chancellor said that the statute which gave the court power to order substituted service ~~substitution served~~ in such manner and in such cases as it might think fit, made no alteration in the law.

That in this country the power extends to cross-bills is sufficiently established by referring to *Ward* v. *Sebring*, 4 Wash. 472, *Johnson Railroad Signal Co.* v. *Union Signal & Signal Co.*, 43 Fed. Rep. 331, and *Lowenstein* v. *Glidewell*, 5 Dill, 325, already referred to. To be sure, in the latter case it is stated

that the reason of the rule is limited to a cross-bill either wholly or partially defensive. That this is the nature of Andreasen's cross-libel, we have already shown. We need not pursue this subject matter further, but may close it by citing from the case last named. "It would be in the highest degree unjust and oppressive to permit a non-resident plaintiff to invoke the jurisdiction of the court in his favor, and obtain and retain, as the fruits of that jurisdiction, a judgment or decree to which he was not in equity entitled, by remaining beyond the jurisdiction of the court whose jurisdiction on the very subject matter, and against the very party, he had himself first invoked."

On the whole, we are of the opinion that it was within the power of the District Court to order the monition served on the proctors of James E. Ward & Co., and that such service was sufficient to enable this court to proceed to a judgment against them personally in all the matters covered by Andreasen's libel.

It is claimed, however, that Andreasen's libel must be held ineffectual, because it joined a proceeding *in rem* with one *in personam* in an action for freight. No exceptions were taken below to the libel on this account, the only ground of the motion to dismiss being lack of jurisdiction over the individuals proceeded against. Moreover, that part of the libel which asked for process against the cargo was entirely ineffectual. No warrant in fact issued against it, and the part of the libel directed against the cargo stands on appeal for all practical purposes as though it never had existed. As under these circumstances it is demonstrated that there could have been no objection to striking out that part, if exception had been taken on account of the joinder, this court on appeal must consider this technical question of pleading as waived in the court below, and of no practical value. If it was necessary to consider the fundamental question involved, the court would probably come to the same result.

We reach now the ~~fundamental~~ principal question in the case, but some preliminary matters need to be cleared from the path. It is claimed in behalf of James E. Ward & Co. that in this case the right to freight ~~must~~ can only proceed on a *quantum meruit*. A fundamental princi-

ple of maritime law is that a marine disaster shall not rest, unless by necessary force of peculiar circumstances, on the vessel alone or the cargo alone. Each is compelled to bear its own portion of the loss. This rule is a recognition of the mutual obligations existing between those who embark in a common adventure. If the cargo is destroyed, even though immediately prior to the close of a long voyage, and even though the ship may remain in condition to complete her voyage, yet her owner shares the loss to the extent of his freight, and relieves the cargo owner accordingly. On the other hand, if the ship is disabled in part and the cargo remains intact, the cargo must ordinarily wait for the repair of the ship, although by the delay it may lose a seasonable market. *Quantum meruit* has no place in transactions like those at bar, unless a *pro rata* freight is to be computed, and then only as an incidental element.

It cannot be claimed that the repairs of the Eliza Lines involved such delay as to break up the voyage. The general rule was laid down in *Clark* v. *Insurance Company*, 2 Pick. 104, *Cargo ex Galam*, Br. & Lush. 187, and *The Soblomsten*, L. R. 1 A. & E. 293. In the case at bar the detention was but a few days in excess of two months, shown by many cases not to be sufficient to break up the voyage; and the repairs, and all the proceedings of the master and vessel, were conducted with great diligence.

A portion of the arguments proceeded on the theory, that the main question involved a race of diligence in making applications to the court for the release and possession of the cargo. In our opinion an important question of this character cannot turn on the mere speed of foot of one party or the other. The court must continue of this opinion, notwithstanding one of the leading cases hereafter referred to, is claimed to turn largely on a different view of the law. There must be reasonable diligence, alike on the part of the owner of the vessel and of that of the cargo. The owner of the vessel is bound to diligence to overcome the delay caused by the disaster; and in addition, his failure to make within a reasonable time efforts to release the cargo, might well be accepted by its owner as an indication of an intention not to complete the voyage, on which the latter would be justified in acting. But this is fundamentally different from a

rule that rights of the character at bar are to be determined by the mere fact of priority of an hour, a day or a week.

James E. Ward & Co. also rely on what is usually known as the cesser clause in the charter. It was said in *Francesco* v. *Massey*, L. R. 8 Ex. 101, that this clause was probably at first introduced in cases where it appeared in the charter-party that the charterer was only an agent. But it was as much needed for the benefit of charterers who were in fact agents, whether they so appeared in the charter-party or not. However that may have been, the clause is a standard one, used without reference to the particular circumstances of each case; and therefore it may well be construed to have full effect in the protection alike of parties who are really agents, and of those whose interests may cease, after the cargo is laden. By the established principles of maritime law there is a triple liability, first on the charter-party, second arising from the bill of lading, and third from the implied obligation growing out of the acceptance of the cargo at the port of delivery. There is no occasion arising from the purpose of this clause, to extend it beyond the liability of the charterer as charterer, and certainly none such arising from its letter as found in this case. The proposition is so clear that we have examined only such decisions as have been brought to our attention, with some cursory labors beyond.

The clause had its origin in England, apparently about 1851. *Hall* v. *Barker*, 64 Me. 339, illustrates the class of hardships which it was intended to meet. There the defendants executed a charter-party, the real charterers being the United States. The United States delayed the discharge of the cargo, and seven years later the nominal charterers were compelled to pay demurrage. Abbott's Law of Merchant Shipping, 13th ed., page 226, says the reason of these clauses is obvious; and it gives as an illustration, a merchant dealing in commodities commonly sold in entire cargoes while afloat, and who finds it worth while to take a small profit, if he can limit his responsibility to such part of the transaction as he can control personally, which is generally the loading. There is nothing, therefore, in the hardships these clauses were intended to remedy, which calls for relief of a holder of the bill of lading

who accepts the cargo from the ship, and thus substitutes his personal obligation in exchange for the lien which, until unlading, the ship had on the cargo. The only case which the court has found bearing precisely on this question is *Gullischen* v. *Stewart*, 11 Q. B. D. 186, (1883), affirmed on appeal in 13 Q. B. D. 317. There the same conclusion was reached which we have reached. The last editions of Carver's Carriage at Sea, (1891) 673, Maclachlan on the Law of Merchant Shipping, (1892) 412, and Abbott's Law of Merchant Shipping, (1892) 238, recognize this case as still the law of England.

In addition to the charter-party, there was the customary bill of lading, running to Thomas Drysdale & Co. The cargo was, however, at all times the property of James E. Ward & Co. and was shipped on their account. Drysdale & Co. were only their agents. Moreover, by their claim, filed on the twenty-seventh of September, 1889, they declared themselves to be its owners, and afterwards maintained persistently that proposition. Whether they held the bill of lading or not would be, therefore, of no consequence, because they estopped themselves from denying ownership. By the sale of the cargo, which they secured on their petition as owners, they displaced the lien of the vessel protecting her right to carry on the cargo, assumed liability for what was thus displaced, and subjected themselves, as we have already shown, to the same obligations to the vessel and salvors as though they had obtained a delivery of the cargo instead of a sale of it.

There remains now the question, whether the proposition of the salvors and Andreasen that the vessel was entitled to receive delivery of the cargo on giving proper stipulation, for the purpose of completing her voyage, or that of James E. Ward & Co. to the contrary, is sustainable. The former rely to some extent on numerous authorities in cases of capture, but the court cannot; because capture is not under ordinary circumstances the equivalent of derelict. In capture there is no such abandonment as that which, according to the authorities cited by James E. Ward & Co., form the basis of a dissolution of the contract of affreightment. If the vessel and cargo are restored after being captured, it is by virtue of

the *jus postliminii*, which it may be said is not analogous to the rights of the owners in a derelict brought in by salvors.

The rule propounded by James E. Ward & Co. finds no support in any expressions in the second edition of Maclachan on Shipping, which was published in 1875, and does not cite *The Kathleen*, decided the latter part of 1874. Neither does it find any in the sixth American edition of Abbott on Shipping, which was the last published before *The Kathleen*. Yet each work treats at various points of the circumstances which dissolve the contract of affreightment. We note these facts, because they go to sustain the proposition which we will explain hereafter, that the cases relied on by James E. Ward & Co. did not declare a recognized and settled rule of law, but were stating for the first time the opinions of the learned judges how the law ought to be held. The first decision on which James E. Ward & Co. rely, is *The Kathleen*, (1874) found in L. R. 4 A. & E. 269, and in 2 Asp. 367. This was followed by *The Cito*, 7 P. D. 5, (1881). There was an allusion to these cases and a partial re-statement of the doctrine in *The Leptir*, 5 Asp. 411, (1885). The rule has also been stated in one form or another in the following authorities: *The Argonaut*, decided in the Court of Appeals by Brett, Master of the Rolls, and Lindley, Lord Justice, and cited in Kennedy's Civil Salvage, page 195; Maclachlan on Shipping, 4th ed. 498, and again, page 613; Carver's Carriage at Sea, 2nd ed. page 562; Williams & Bruce's Admiralty Practice, 2nd ed. page 165; Abbott's Law of Merchant Shipping, 13th ed. page 429, and again page 455; and it is recognized in Kennedy's Civil Salvage, already referred to, page 195. No late English authorities are found controvening it. These make a great weight of authority. But as they constitute only a modern declaration how the rule ought to be laid down, they are subject to examination in the Federal courts.

Returning now to *The Kathleen*, there seems to be some doubt whether her cargo was regarded as perishable. It also appeared that there was no intention of carrying forward the cargo in the same ship. No distinction, however, was made for either of these reasons; but the learned judge held that no freight was due, not even *pro rata* freight, and put the case squarely on the grounds

that "the master had abandoned all possession of the ship, and at the time of the abandonment had certainly lost all rights to the freight or to carry on the cargo", that although the salvors had only a lien, yet they were "in lawful possession", and could not "be displaced by the owners", that when a salvage suit begins, "the property is placed in the custody of the court, which is bound to do what is best for it", the ship-owners "receive the remainder of their abandoned property after the legal charges on it have been satisfied", and that in fact "the possession of the cargo abandoned by the ship-owner vested first in the salvors, and afterwards in this court, before it could be restored to the owners."

The theory seems to be that by derelict the property passes out of the possession of the owners of the vessel into that of the salvors, coming then into the court, and that this forms a continuous dispossession; so that whatever new possession follows, vests under the judgment of the court, and not by any *jus postliminii*, as in the case of capture. Applying the rule in this way, it is universal, reaching all cases of derelict which are followed by subsequent proceedings in behalf of the salvors in the admiralty court, and whether the vessel was brought by the salvors into the port of destination or not. The result has the advantage of consistency throughout. It has, also, the further advantage of certainty, so desirable in cases of disaster, as it enables the numerous parties concerned to assume at once a positive position, and ascertain promptly their various rights. It is not an improper criticism to suggest that this latter fact had some weight with the learned judge in inducing his conclusions in *The Kathleen*. We are unable to see any other advantage flowing from them.

Sir Robert Phillimore overlooks the rights of the cargo-owner under many circumstances which might be suggested; although in *The Cito*, which we will next consider, there was an effort to supply this gap. It would seem to follow that on the theory of Sir Robert Phillimore both parties are released, the cargo from the vessel and the vessel from the cargo. The mischief of such a proposition was hardly apparent in the circumstances of *The Kathleen*; but assuming the derelict to have been at some remote port, where the owners

could be represented only with difficulty and delay, the mischief of absolutely discharging the vessel from the cargo in consequence of a derelict, must be appreciated. We do not mean to raise the question, whether ordinarily, in case the ship itself is disabled from carrying forward the cargo, the duty of the master to tranship it rests upon him as representing the vessel, or upon him as representing the cargo; but we allude to the general rule that where the master can repair in a foreign port without unreasonable delay, or disproportionate expenditure, it is his duty to do it and carry on the cargo. The authorities on this point need hardly be cited, and we refer only to Carver's Carriage at Sea, 2nd ed. 308, and to the latest statement of the rule, as found in England, in *Assicurazioni Generali v. SS. Bessie Morris Co.*, (1892) Q. B. 652.

The rule of *The Kathleen* is calculated to work great injustice; as it might in the case at bar, and certainly would in the supposed case of a long voyage, nearly completed, and the vessel brought by salvors into the port of destination, or into a neighboring port quite as desirable for the cargo owners, with the cargo intact, and a valuable freight lost to the ship and saved to the cargo, without any equivalent or consideration thereof. Numerous cases can be imagined where the injustice of the rule of *The Kathleen* would shock common sense.

The result, therefore, so far as *The Kathleen* is concerned, is that on the one side we have a theory plausible in its form, but not apparently sustained by authority, coupled with the minor advantage which comes from a rule of certainty in this particular, and on the other side the fundamental maritime rules of universal operation, based on a deep sense of the obligations toward each other, in the case of a maritime disaster, of all parties interested in the same adventure. Further than this, we shall find on examining subsequent English cases that while the result in *The Kathleen* has been practically sustained under certain circumstances, its theory is apparently not accepted.

No appeal was taken from the judgment of Sir Robert Phillimore in *The Kathleen*; but in *The Otto*, 7 P. D. (1881), the same

question came before the Court of Appeal. The circumstances of that case were more close to the case at bar than those of *The Kathleen*, in fact hardly distinguishable. The grounds of the judgment were not the same as in *The Kathleen*. The only proposition actually decided in *The Cito* is contained in the following language from the opinion of Lord Justice BRETT: "It is sufficient, I think, for the determination of the present case to say that by the abandonment of a ship without any intention to retake possession of it, the ship-owner has, so far as he can, abandoned the contract so as to allow the other party to it, the cargo-owner, to treat it as abandoned." This is essentially different from the propositions of Sir Robert Phillimore, in that the latter finds the contract expressly dissolved as an incident of the derelict, while the former merely holds that the cargo-owner has the option of dissolving. This distinction would obviate one objection arising from the position of Sir Robert Phillimore, inasmuch as it would compel the master of the vessel to carry on the cargo under proper circumstances. But to that extent it increases the injustice of the position, by relieving through a maritime disaster one party to the contract, while holding the other. *The Cito* also leaves out the element of certainty found in *The Kathleen*, as we have already explained. *The Cito* seems, on the whole, to depart even farther than *The Kathleen* from the fundamental rules binding the ship and cargo together in cases of maritime disaster.

We have already referred to the fact that the conclusion of the Court of Appeal was reaffirmed in *The Argonaut*. The last decision on this topic brought to the attention of the court is *The Leptir*, 5 Asp. 411. It was there held that the rule would not apply where the abandonment was improper; because in that case, it was said, the contract of affreightment would not be put an end to by the abandonment. If this had been a decision of the Court of Appeal, it would have brought the rule, as laid down in England, to the absurdly unjust conclusion that the meritorious master who succumbs to the inevitable results of a maritime disaster, must lose his freight, while the unmeritorious master may secure it.

The rule is given in Williams & Bruce's Admiralty Practice, 2nd ed. 165, as follows: "Where a vessel laden with cargo is abandoned

at sea by her master and crew, and is afterwards salved, and brought by the salvors into a port other than the port of discharge, the contract of affreightment is dissolved, and the owners of the cargo are entitled to obtain its release without payment of any freight at all, and the shipowners are consequently not liable for salvage on the freight." This adds a new qualification. It is not, however, consistent with the rule in *The Kathleen*, that the abandonment dissolves the contract, and it adds the further fundamentally objectionable feature, that it makes the right to freight depend on the convenience, or even the caprice, of the salvors, in determining whether they will bring the vessel into the port of destination or into some other port. The rule as repeated in the fourth edition of Maclachlan on Merchant Shipping, 498 and 613, is stated more nearly as laid down by Sir Robert Phillimore, to the effect that the abandonment of the ship has the effect of dissolving the contract of affreightment. In Abbott's Law of Merchant Shipping, 13th ed. it is given, page 429, as follows: "The right of the owner of goods to their return before the ship has reached its destination, without payment of the agreed freight, seems to depend on his being able to show that the shipowner has abandoned the contract of carriage." Except for the reference in the note to *The Cito*, this expression would hardly be construed to apply to a case of derelict. Where the rule is given on page 455, it is only a statement of it as held in *The Cito*; except that it is again limited by the qualification that the ship is brought by the salvors into a "port of refuge," meaning, of course, some port other than that of destination. What is there said touching *The Cito* closes as follows: "At first sight the reason for this decision is not clear; but it will probably work substantial justice."

None of these citations from English text works assume to be more than a repetition of the conclusions in *The Kathleen* or *The Cito*; none of them contain any illustration of the rule, or any statement of any reasons on which it is based; the last expresses the doubt touching its propriety which we have cited; and taking the whole line, beginning with *The Kathleen* and ending with Abbott's Merchant Shipping, the result is inharmonious and unsettled. In view of the fact also that in many cases it must do sub-

stantial injustice, as we have already shown, we do not feel authorized to adopt it for the first time in any of the courts of the United States, as against the fundamental rule of maritime law that the ship is bound to the cargo and the cargo to the ship. We feel compelled to hold that the circumstance of derelict, followed by the further circumstance that the derelict comes into the hands of salvors and from their hands into the admiralty court, is only a particular phase, not differing in essentials from other phases, of the incidents of the perils of navigation, from which the ship is bound to relieve the cargo so far as circumstances will permit, and which will not deprive the vessel of its freight, if prepared to earn it. Whether or not the master is compelled to surrender his vessel and cargo into the exclusive possession of the salvors, to be followed afterwards by the possession of the court, or whether or not, before legal proceedings are taken, he succeeds in securing possession of both on an adjustment, is of no apparent importance with reference to the fundamental interests of either the owners of the one or the other. In either case complications may arise which will render it impracticable for the master to secure again possession of the cargo, or which may relieve him from the duty of attempting to do so. But, if overcome, or if they can be easily overcome, especially in remote ports, where the cargo cannot be promptly represented, the substantial duties and rights of the master ought to remain the same under any of the contingencies stated.

We have stated that we are without any direct decision of this question in the United States; and, so far as we have been able to discover, there have only been two cases in which it has come under discussion. Each arose in this circuit. The general question involved was in each largely considered,—but in the first without evidence that the practical applications and limitations rendered necessary in the case at bar were considered, and in the second with an apparent acceptance of the principles which we have adopted. In The *Elizabeth and Jane*, Ware's Reports, 41, decided in 1823, it appeared that the vessel was derelict, was rescued with her cargo by salvors and brought into the District of Maine, and there libeled and sold for salvage. The case before the court arose on a petition

against the proceeds for seamen's wages. The opinion, which is of great merit, in its discussion of the rights of the mariners, considers whether any freight was earned out of which wages might arise, and holds that there was none. It lays down in general terms the same rule as that given in *The Kathleen*.

The case was tried very soon after Judge WARE came on the bench, and involved directly the important question which that learned judge contributed so much to settle, namely, the right of mariners to wages as against salvage when there was no correct delivery of the cargo. It was on this proposition that the attention of the learned judge was fixed. This court has examined the papers on file, and ascertained that the *terminus ad quem* of the voyage of the Elizabeth and Jane, with her cargo, was Boston, that she was brought into Harpswell in the District of Maine, and that no effort or attempt was made to earn her freight. Therefore the precise question in the case at bar was not brought to the attention of the court; and we are unable to say how far the expressions found in the opinion would in that event have been limited, or how far the learned judge intended to discriminate between cases where the voyage was broken up by derelict, or by wreck under other circumstances.

Whatever weight might otherwise be given *The Elizabeth and Jane*, and however embarrassing its expressions might be with reference to our reaching the conclusions which we have reached, if it stood alone, it is overborne by *The Nathaniel Hooper*, 3 Sum. 542, decided by Judge STORY in the Circuit Court for the District of Massachusetts in 1839. It is true that this later case cannot be relied on as authoritively determining the law in favor of the appellants in the case at bar, because the result of it was that under the circumstances the court held no freight was earned; but we have here an important case, presented by such distinguished counsel as Rufus Choate on the one side and Benjamin R. Curtis on the other, with an elaborate opinion, covering eighteen printed pages, of which only a small part would have been necessary, if the same rule as that of *The Cito* had had any lodgment in the mind of the eminent jurist who heard and disposed of it. It is not necessary

to cite precise expressions showing that no such rule had any lodgment in his mind, of which there are several, because the entire opinion is constructed on that theory. So far as clear expressions and a general line of reasoning, found in an opinion which does not directly determine the precise question involved in a subsequent case, can be binding authority for the latter, this opinion of Judge STORY, given in this court, concludes us to find for the vessel as against the cargo and its owners in the case at bar.

The same result which condemns James E. Ward & Co. for freight, also condemns them for general average contribution on account of the cutting away of the masts to right the vessel, and for other charges.

We have not received from counsel any special suggestions touching the adjustment to be made in accordance with the principles of this opinion. Therefore, while we nevertheless prefer at the present time to indicate the rules on which we think that adjustment should be made, we would be glad to receive from either party suggestions touching any error into which we have fallen with reference to the details thereof. It simplifies the adjustment to adopt, so far as practicable, the work done in that direction by the District Court. It will be especially convenient, for the purpose of making distribution, so far as it can be made in advance of the delay which may result in realizing from James E. Ward & Co., if a realization ever takes place, to adopt that feature of the adjustment in the District Court which, without objection from any party, applied the proceeds of the cargo in the registry in part payment of the freight.

The adjustment necessarily involves different valuations of freight; one with reference to its value for contributing to general average, another the net value for which James E. Ward & Co. are chargeable, and another the value on which additional salvage shall be awarded. So far as the ~~latter~~ last is concerned, the District Court awarded approximately forty-five *per centum* of the net values of the vessel and cargo. The ultimate amount which the salvors will receive is the essential thing to be had in mind; and, looking at this, it is not important whether the court takes the gross value of the freight or the net value, estimated by one rule or another, and thereupon modifies accordingly the percentage at which the sal-

vage is to be computed. The court will reach a conclusion which it regards as just, and as following in this particular the analogy of that of the learned judge of the District Court, by awarding the salvors forty-five *per centum* of the net freight to be estimated for that purpose, as will be hereafter pointed out, in addition to the amounts awarded by the District Court against the proceeds of vessel and cargo.

In making up the judgment and decree rendered necessary by this opinion, the first step will be to determine the amounts the freight and cargo contribute to general average. For this purpose the commissioner will accept as general average charges the masts which were cut away to right the vessel. The value of the vessel on arrival at Boston will be taken at $2,250. In other respects general average will be adjusted on the same principles as though the voyage had been subsequently completed, and according to the customs prevailing at the port of Boston.

The next step will be to determine the net amount due on account of freight and general average from James E. Ward & Co. In connection with this, the court has considered the expressions in *The Norma*, Lush. 124, *The James Armstrong*, 3 Asp. 46, and the comments on each in Kennedy's Law of Civil Salvage, 193 and sequence; and it notes especially that, as said by Sir Robert Phillimore in *The Norma*, the judgment of the court must be a *rusticum judicium*, and that while, in those cases, the value of the freight was nominally made on the principle of *pro rata itineris peracti*, yet the practical rule was one of net freight, a practical and substantially just method of determining freight *pro rata*. In the same connection it has examined *The Nathaniel Hooper*, 3 Sum. 542, already cited, where like expressions are used. These however, all related particularly to the determination of the contributory value of freight at various ports and periods. In *The Dorothy Foster*, 6 Rob. 88, the gross freight was apparently required to contribute to the salvage, although the voyage was partly performed. There are expressions in various text books and decisions, leading to the impression that where the voyage has been broken up by the cargo-owner after it has commenced, as we find to be the fact in the case at bar, the owner of the

ship is entitled to gross freight. We do not understand, however, that this has been so expressly determined; and to give him gross freight would ordinarily more than indemnify him, and would impose a penalty on the owner of the cargo, instead of compelling him to pay just damage. This the admiralty courts are not prone to do. Therefore for this matter, we direct the commissioner to deduct from the gross freight, such actual and theoretical charges as would be necessary to ascertain the net freight, in case the cargo had been reladen and the voyage completed. This involves the deduction of contribution to general average, inward charges at Montevideo or Buenos Ayres, marine insurance on vessel and freight from Boston to the port of discharge, and ~~common law~~ statutory interest on the value of the vessel during the probable period of that voyage and perhaps other charges. General directions will be found in Williams & Bruce's Admiralty Practice, 2nd ed. Hagle 101, 102, and in some of the cases there cited, and in other well-known authorities.

Having ascertained this amount, the commissioner will add to it what James E. Ward & Co. are bound to contribute to general average as representing the cargo, and deduct ~~from it~~ the net value of the cargo, namely, $910.74 plus $787.65, total $1708.39, which, without objection, was applied by the District Court towards the payment of freight and general average, as a credit to which they are entitled.

The commissioner will then ascertain what freight was in fact earned by the Eliza Lines on her voyage out of Boston, and on the principles herein laid down, its net value. He will then ascertain the actual date at which she completed the earning of it. If these cannot be ascertained as matters of fact, he will estimate them. He will then estimate approximately the date at which the Eliza Lines would have earned her freight under the charter in the case at bar, if she had been allowed to re-load her cargo and complete her voyage. If the latter date is subsequent to the former, or if prior to the latter date the Eliza Lines earned any other freight, in addition to that earned on her voyage out of Boston, he will deduct the whole of the net freights so earned from the amount apparently due from James E. Ward & Co. as last stated. If, however, the latter date

anticipates the prior date, he will compute *pro rata* the net freight so earned, based on periods computed from November 16, 1889, the date when the application of Andreasen for possession of the cargo was finally refused, and deduct the result as already directed. In either case the net sum thus obtained will be the amount for which the decree will go against James E. Ward & Co.

The next step for the commissioner will be to state the amount of the net freight of the voyage to Montevideo and Buenos Ayres, as if the same had been completed, estimated in all respects as already directed, with the deduction of the share of general average chargeable against freight, but without any addition of any sums due from James E. Ward & Co. to general average on account of the cargo, and without any deduction of any part of the $1,708,39, and also without any deduction of any net freight actually earned by the Eliza Lines on her voyage out of Boston, or any subsequent voyage. He will compute forty-five per centum of the result, for which there will be a decree in full for salvage services and expenses touching freight.

On the coming in of the report of the commissioner, there will be a joint decree: first, in favor of Black, in behalf of himself and his associate salvors, and of the owners, officers and crew of the schooner Edward E. Barrett, for the same amounts, including expenses and costs, decreed by the District Court, and apportioned as decreed by it, except that the amount stated to be apportioned against freight will be stated to be apportioned against cargo, the same presently payable as therein provided, and for the additional amount of forty-five per centum of freight to be found by the commissioner, as directed in this opinion, with interest on said per centum of freight from the date of the commissioner's report, said per centum of freight and interest thereon to be payable only from sums realized from James E. Ward & Co. as the same are realized, and also for further costs in favor of Black against James E. Ward & Co. for his actual taxable disbursements on this appeal; second, subject to the priority of the salvors, in favor of the Banque De Genes, against the vessel and freight, including average payable by the cargo to each, for fourteen hundred and fifty-eight dollars, and interest

from the date of its libel, of which ten hundred ninety-two dollars and sixty-eight cents will be payable presently, seven hundred seventy-seven dollars and eighty-three cents thereof by the stipulators for the vessel for so much as remains, and three hundred fourteen dollars and eighty-five cents thereof from the net proceeds of the cargo in the registry, accepted, as already said, by all parties as freight, for so much as remains, and the balance payable only from any sums realized from James E. Ward & Co. as the same are realized, after payment of the portion thereof awarded to the salvors, and further against Andreasen for its costs in this court and the court below; third, in favor of Andreasen, in behalf of himself and the owners of the bark, for whatever balance may remain after payment of the salvors and the Banque De Genes, ~~of and~~ and payable from the amounts realized from James E. Ward & Co. as the same may be realized, and further for costs in this court and the court below, against James E. Ward & Co., except so far as such costs are herein awarded to Black; fourth, that Bernard Darrach be dismissed from the cause, with costs of appeal in his favor, one-half against Andreasen and one-half against Black; fifth, against James E. Ward & Co. in favor of Black, the Banque De Genes and Andreasen, for the net balance of freight and general average to be decreed against James E. Ward & Co. as already pointed out, the decree to state the same priorities between Black, the Banque De Genes and Andreasen as already set out, and to provide that it may be enforced outside of this district, and, so far as thus enforced, distributed among the parties in interest without being paid into the registry of this court; sixth, directing all matters and things as decreed by the District Court, except as herein provided for or modified.

It will be noted that in accordance with the principles of this opinion, the freight, if there is sufficient of it, should exonerate the vessel from any liability on the bottomry held by the Banque De Genes; but in view ~~of the improbability of there being sufficient for that purpose, and also~~ of the fact that the court is not cognizant of any separate interests which require the application of this equity of exoneration, the court contemplates no decree in that

direction. The parties will be at liberty on further consideration to ask for such order or decree, if the circumstances require it. Also like application may be made, if it is hereafter found necessary to adjust accurately the net freight and averages holden for the bottomry.

Ordered: In each of numbers 3546, 3547, 3548, 3549 and 3550, be entered an order that the cause is consolidated with *The Eliza Lines*, No. 3545, according to the terms of the order this day entered in said last-named case.

Ordered: In number 3545, be entered an order that *The Eliza Lines*, number 3546, *Cargo ex The Eliza Lines*, number 3547, *Andreasen* v. 295,000 *feet of Lumber and Darrah et al.*, number 3548, *The Eliza Lines*, number 3549, *The Eliza Lines*, number 3550, are consolidated with this case, and this case will be re-entitled "The Eliza Lines, her cargo and freight," and with the other cases named will hereafter proceed, be disposed of and recorded as one cause only; and that the cause, number 3545, as consolidated, is referred to commissioner, who shall hear the parties, and make the adjustments and findings required in the opinion filed this day, and on the principles therein set out, and make report thereof; and the said commissioner shall receive for his only commission a certified copy of this order and of said opinion; and on the coming in and confirmation of such report, a final decree shall be entered in accordance with such opinion and this order.

Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

No. 162.

THE ELIZA LINES, HER CARGO AND FREIGHT.

CONSOLIDATED CAUSE.

REPORT OF COMMISSIONER AND EVIDENCE RETURNED WITH REPORT.

EDWARD S. DODGE, *for* BLACK *et al.*
JOHN LOWELL, *for* HANS ANDREASEN.
LEWIS S. DABNEY, FREDERIC CUNNINGHAM, } *for* DARRACH.
CHARLES THEODORE RUSSELL, *for* BANQUE DE GÊNES.

BOSTON:
E. H. LANE, LAW PRINTER,
97 OLIVER STREET,
1901.

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Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

No. 162 Law [New Docket].
No. 3545 Law [Old Docket].

THE ELIZA LINES, HER CARGO AND FREIGHT.

REPORT OF COMMISSIONER.

[FILED MAY 12, 1869.]

Pursuant to the order entered in the above-entitled cause, I have heard the parties on different days, have considered the evidence and arguments offered by them respectively, and I now report as follows:

The various steps to be taken by the Commissioner are indicated in the Opinion of the Court, a certified copy of which (Opinion, p. 39) constitutes the Commission. These steps are:

1st step. (Opinion, p. 35.) "To determine the amounts the freight and cargo contribute to general average."

2d step. (Opinion, p. 35.) "To determine the net amount due on account of freight and general average from James E. Ward & Co."

The directions for this determination are given in detail on pages 36 and 37 of the printed Opinion.

3d step. (Opinion, p. 37.) "To state the amount of the net freight of the voyage to Montevideo and Buenos Ayres as if the same had been completed," in accordance with directions given for such computation, and "to compute forty-five per centum of the result, for which there will be a decree in full for salvage services and expenses touching freight."

AMOUNT OF GENERAL AVERAGE.

The Commissioner finds no specific instruction that he ascertain and state the total amount for which contribution in general average should be made; but as the Opinion seems to proceed throughout on the assumption of such a statement, and states the principles on which it should be made, and as it seems impracticable to determine (as directed on page 35 of the Opinion) the amounts which freight and cargo respectively contribute to such general average without first ascertaining the total amount for which contribution is to be made, the prior determination of such total amount is deemed necessary.

The Opinion (p. 35) contains the specific direction that "the value of the vessel on *arrival at Boston* be taken at $2,250," and that "*in other respects general average will be adjusted on the same principles as though the voyage had been subsequently completed*, and *according to the customs prevailing at the port of Boston.*"

By this the Commissioner understands that the valuations (other than of the vessel on arrival at Boston) upon which the general average statement is to be made up, and for which contribution is to be made, are to be taken as if the voyage had been completed, and as if the vessel had delivered its cargo (other than that jettisoned) at its port of destination, and had thereby earned its freight; but that the deductions from gross valuations to cover cost of delivery, earning freight, etc., and other necessary deductions and apportionments, are to be made in accordance with the customs prevailing at the port of Boston.

The Commissioner also understands that as the completion of the voyage would involve making good to the vessel the sacrifices she made for the common good, and which are contributed for in general average to the amount of $4,390.84, that amount must for general average purposes be added to the $2,250, the value of the vessel on her arrival at Boston, which of course does not include allowance for such sacrifices.

The argument has been addressed to the Commissioner in behalf of the owners of the cargo,—

(*a*) that the cargo jettisoned should be contributed for at its value at Boston, the port where the voyage was broken up and where the adjustment of the average is made; and—

(*b*) that the value at Boston should also be adopted as the basis upon which cargo saved is to contribute to general average charges.

In 2d Arnold on Marine Insurance (6th Ed.), p. 910, it is said that—

"As a general rule the place for the adjustment of general average is at the ship's port of destination or discharge. . . .

"If the adventure be broken up at an intermediate port . . . that port becomes in effect the vessel's port of discharge, and the place, therefore, for adjusting the general average."

In Lowndes on General Average, p. 264, the rule is thus stated:

"When the voyage is terminated . . . and when in consequence the average is properly adjusted at some place other than that of destination, the allowance for jettison must be regulated by the value of the cargo at that place."

But it is also a settled rule that, "if the vessel arrives at the port of destination, the value . . . of jettisoned cargo should be" the net price for which the cargo might have been sold there.

Tudor v. *Macomber*, 1 Pick. 34, 38.
Bailey on General Average, p. 184.

In the case of the Eliza Lines the Court has found (Opinion, p. 5 *et seq.*) that the sale of the cargo ordered by the District Court "was not a sale for necessity . . . nor as a matter of right or necessity for the purpose of ascertaining how the salvors' services were to be computed"; but that (p. 6) "it must be held to have been made on the application of the owner of the cargo, not for the common interest, but for his own alone"; and that under such circumstances (p. 6) the party applying for a sale "subjects himself to the equitable consequences thereof."

To the same effect (Opinion, p. 8):

"But on the whole we think the owner who obtains delivery of

the cargo, or what is equivalent, the possession of the proceeds after a sale made solely in his own interest, cannot avoid any liability merely because he has accomplished this through the medium of an interlocutory, and perhaps *ex parte* order, from which there is no appeal which can afford a substantial remedy if the order proves erroneous. In this event he must stand the same consequences as though he had accomplished immediately, by his own act, what he succeeds in accomplishing mediately by himself setting the Court in motion."

And again (Opinion, p. 26):

"By the sale of the cargo which they secured on their petition as owners, they displaced the lien of the vessel protecting her right to carry on the cargo, and subjected themselves, as we have already shown, to the same obligation to the vessel and salvors as though they had obtained a delivery of the cargo instead of a sale thereof."

The Court having found (Opinion, p. 3) that the master desired to repair the vessel and carry forward the cargo; that he "acted with all the promptness which the law could require," and (Opinion, p. 24) that "the repairs and all the proceedings of the master and vessel were conducted with great diligence," and that the vessel was in fact ready for sea, notwithstanding interruptions, "at least as early as December" (Opinion, p. 3) and that the sale of the cargo was procured by the owners for their own benefit, and not of necessity or legal right, the Court orders (Opinion, p. 35) that the owners of the cargo contribute toward the general average charges upon the same basis as if the cargo had been carried to its port of destination and there delivered, and according to the customs prevailing at the port of Boston.

If, therefore, the Commissioner rightly understands the Opinion of the Court, he finds in the express directions therein contained a sufficient answer to all arguments in favor of the adoption by the Commissioner of a different rule, however the different rule may be supported by authorities applicable under other circumstances.

With the valued aid of Mr. Theodore W. Gore, of Boston, average adjuster, a general average statement has been made up in accord-

ance with what are understood to be the directions contained in the Opinion.

The master of the Eliza Lines testifies (Record in No. 3545, p. 27) that he threw overboard three thousand to four thousand feet of his deck load of lumber. The larger amount,—4000 feet,—is adopted for the purpose of the general average adjustment. The lumber so jettisoned is contributed for at the same net value that the Commissioner finds the other cargo would have had if it had arrived at Montevideo or Buenos Ayres.

The statement of average accompanies this Report as part thereof. The items and valuations embodied therein appear in the statement, which shows the aggregate amount of the general average charges, as found by the Commissioner, to be $6,434.10.

CONTRIBUTION.

It has been found convenient in dealing with the matter of contribution of the different interests to the general average to change somewhat the order of the steps indicated in the Opinion and to separate the two things which in the Opinion (2d step, p. 35) are stated under one head, and to ascertain, separately,

(*a*) The amount due from James E. Ward & Co. on account of general average, as representing cargo.

(*b*) The net amount due from James E. Ward & Co. on account of freight.

CONTRIBUTORY VALUE OF CARGO.

If the cargo, other than that jettisoned, had been carried to its destination and had been there delivered, the jettisoned cargo would have been contributed for in general average, and the entire cargo would have contributed toward general average charges incurred on the voyage, on the basis of the net value of such cargo at port of destination; that is to say, on the basis of its market value at that port, less freight and other usual and customary charges by which it acquired such market value.

The evidence is conflicting as to what would have been the value of the cargo of the Eliza Lines at Montevideo or Buenos Ayres.

Its invoice value at Pensacola is shown by the invoice which was produced and put in evidence to have been $11.75 per thousand, equal $3,460.77.

The Commissioner finds, upon the evidence, that the market value at Montevideo or Buenos Ayres of sound cargo, such as that of the *Eliza Lines, at the time the Eliza Lines* should have arrived at Montevideo or Buenos Ayres, if she had been repaired and had resumed her voyage without interruption by legal proceedings, was $40 per thousand.

Mr. Bradford Darrach, called by the owners of the cargo, or their representatives, testified to the condition of the cargo so far as seen by him in Boston, and that in his judgment such condition would involve a loss of from 25 per cent to 40 per cent from its sound market value,— not less than 30 per cent — probably more.

Other witnesses gave different testimony as to the condition of the cargo in Boston and as to the probable depreciation in value of the damaged part at its port of destination, rating such depreciation at 10 per cent on the damaged part.

The Commissioner is of opinion that the truth lies between these extremes, and finds as a fact, upon all the testimony, that a deduction of ten per cent (10%) from the net sound market value at Montevideo or Buenos Ayres of all the cargo would fully cover depreciation of market value in consequence of sea perils to which the cargo was exposed before the vessel's arrival at Boston.

The 4000 feet which the Commissioner finds were jettisoned are therefore contributed for in the general average statement above referred to upon the basis of their net sound market value, less 10 per cent depreciation by sea damage, and the cargo's contribution to the general average is calculated upon the same basis of net sound value, less 10 per cent for depreciation by sea damage.

2 Phillips on Insurance (5th Ed.), sec. 1371, p. 125.
2 Phillips on Insurance (5th Ed.), sec. 1375, p. 127.
Barnard v. *Adams*, 10 Howard, 270.
Columbian Ins. Co. v. *Ashby*, 13 Peters, 330.

The total cargo shipped by the Eliza Lines (including that jetti-

soned) appears by the bill of lading (Record No. 3545, p. 37) to have been 294,534 feet.

On deck, 34,200 feet; under deck, 260,334 feet; in all, 294,534 feet.

The *4000 feet of* deckload jettisoned is included in the general average contribution, and as what is contributed for also contributes, in computing their contributory values no deduction is made from the value of cargo at port of destination, or from the estimated freight thereon, by reason of the jettison.

294,534 feet of lumber at $40 per M., equal		$11,781.36
Less freight on 260,334 under deck at $20,	$5,206.68	
Less freight on 34,200 feet on deck at $13.33,	455.89	
		5,662.57
		$6,118.79
Less 10 ten per cent for depreciation by sea damage		611.88
Leaves value of cargo to contribute to general average		$5,506.91

CONTRIBUTORY VALUE OF FREIGHT,

(including freight on cargo jettisoned, because such freight is contributed for).

Gross freight at $20 per M. on 260,334 feet under deck,	$5,206.68
Gross freight at $13.33 per M. on 34,200 feet on deck,	455.89
	$5,662.57
Deduct according to custom of port of Boston (see also Phillips on Insurance, 5th Ed., sec. 1392) as the equivalent of cost of earning freight, one third	1,887.52
Leaves contributory value of freight	$3,775.05

VESSEL.

Value on arrival at Boston (Opinion, p. 35)	$2,250.00
Add amount made good in general average for sacrifices made	4,390.84
	$6,640.84

The general average charges, amounting to $6,434.10, are therefore to be borne by the following interests in the following proportions:

Vessel on $6,640.84 pays	$2,683.43
Net freight on $3,775.05 pays	1,525.43
Cargo on $5,506.91 pays	2,225.24
	$6,434.10

SECOND STEP (Opinion, p. 35).

AMOUNT DUE ON ACCOUNT OF FREIGHT AND GENERAL AVERAGE FROM JAMES E. WARD & CO.

(*a*) *On account of general average.*

The amount which James E. Ward & Co., as representing cargo, are bound to contribute to general average (Opinion, p. 36) has already been ascertained and stated at $2,225.24.

(*b*) *On account of freight.*

Pursuing the inquiry in the manner directed by the Court (Opinion, pp. 36, 37), the Commissioner deducts from the gross freight from Pensacola to Buenos Ayres, which amounts, as per charter party and Bill of Lading, to		$5,662.57
One third, as the equivalent by custom of Boston of the charges enumerated in the Opinion, other than general average	$1,887.52	
Also freight's contribution to general average,	1,525.43	
		3,412.95
Leaving		$2,249.62
To this the Commissioner adds, as directed (Opinion, p. 36), "what James E. Ward & Co., as representing the cargo, are bound to contribute to the general average." This obligation is already found to be		2,225 24
		$4,474.86

From this the Commissioner deducts the amount stated in the Opinion (p. 36) as the net value or proceeds

Amount brought forward	$4,474.86
of sale at Boston of the cargo, which the Court finds (Opinion p. 36) is a credit to which James E. Ward & Co. are entitled, the same having been applied by order of the District Court toward the payment of freight and general average . .	1,708.39
Leaving "apparently due" from James E. Ward & Co.,	$2,766.47

From this amount ($2,766.47) "apparently due" from James E. Ward & Co., the Opinion (p. 36) directs the deduction of the

NET EARNINGS OF THE ELIZA LINES.

on the substituted voyage (Opinion, pp. 36, 37).

The gross freight of the Eliza Lines from Boston to Lisbon, as per charter party, was	$2,904.00
Deduct, according to usage in Boston, as the equivalent of the cost of earning the same, one third, equal, .	968.00
Leaves net freight, Boston to Lisbon	$1,936.00

It was in evidence, and was undisputed, and the Commissioner finds accordingly, that the Eliza Lines completed her voyage to Lisbon, February 7, 1890.

Having ascertained the amount of the Lisbon freight and the date of the arrival of the Eliza Lines at Lisbon, the Court directs (Opinion, p. 36) that the Commissioner "then estimate approximately the date at which the Eliza Lines would have earned her freight under the Charter in the case at bar if she had been allowed to reload her cargo and complete her voyage."

Mr. Lootz, called in behalf of the owner of the Eliza Lines, testified on cross-examination that if the cargo had not been taken away from the vessel she would have unloaded not more than half of her cargo. "There was nothing to be done to her keel or hold, and we would only have to unload half the cargo and reload it again."

Mr. Lootz further testified that the Eliza Lines arrived in Boston September 19, 1889; that if she had been allowed to discharge her cargo, such discharge would have begun on September 22; that it

would have taken at the utmost ten days to discharge that cargo, one day to move the ship to the dry dock, five days in the dry dock, two days more to get ready to take on board the cargo, and, weather permitting, twelve or fifteen days to reload the cargo, and that two days would then be required to get the vessel through the Custom House and get the papers in order, at which time she would be ready to go to sea.

This testimony was uncontradicted and is accepted by the Commissioner as a correct statement of the time which would have been required to enable the Eliza Lines to resume the prosecution of her voyage if the entire cargo had been discharged, the vessel repaired and the cargo reloaded. That would have made the Eliza Lines ready to resume the prosecution of her voyage on the 27th of October, 1889.

There was also uncontradicted testimony from more than one witness that fifty-five or sixty days would be a good average length of voyage from Boston to Montevideo or Buenos Ayres at the season of the year at which the Eliza Lines would have continued the prosecution of her voyage if her cargo had not been taken from her.

Upon this uncontradicted testimony the Commissioner finds as a fact, even if the entire cargo of the Eliza Lines had been discharged, that if she had been allowed to reload her cargo and complete her voyage she might have arrived at Montevideo or Buenos Ayres by or before January 1, 1890 — say forty-five days from November 16, 1889.

James E. Ward & Co. are therefore entitled, in accordance with the directions to the Commissioner, to a credit of 45/83 of $1,936, equal $1,049.62.

From the amount of $2,766.47, above stated . .	$2,766.47
"Apparently due" from James E. Ward & Co., deduct,	1,049.62
and it leaves the *net amount* of	$1,716.85

still due from James E. Ward & Co. to the owners of the Eliza Lines as of the date when she would have earned her freight under the Charter Party from Pensacola to South America.

As the Opinion is silent as to interest, no interest is added.

THIRD STEP.

SALVORS' CLAIM ON FREIGHT.

The third step which the Commissioner is to take (Opinion, p. 37) is to ascertain and state, in accordance with directions given, the amount for which there will be a decree in favor of the salvors as against freight.

The net amount of freight of the voyage from Pensacola to Montevideo and Buenos Ayres, if the Eliza Lines had been allowed to reload her cargo and complete her voyage, may for this purpose be stated as follows:

Gross freight on 260,334 feet under deck cargo at $20 per M.	$5,206.68
Gross freight on 34,200 feet on deck, less 4,000 jettisoned,	
30,200 feet at $13.33 per M. . .	402.57
	$5,609.25
Less one-third, by custom of Boston, for cost of earning,	1,869.75
Leaves net freight for the voyage	$3,739.50
From this net freight of	$3,739.50
The Commissioner is directed to deduct freight's contribution to general average, already stated at . .	1,525.43
And to compute 45 per cent of the balance . . .	$2,214.07
Say 45 per cent of $2,214.07 equal	$996.33

For which latter amount ($996.33) the salvors are, by the terms of the Opinion, entitled to a decree for salvage as against freight.

TO RECAPITULATE AND SUMMARIZE.

The Commissioner finds and reports:

1st. The total of general average charges		$6,434.10
To be apportioned on:		
Vessel, $6,640.84, pays	$2,685.43	
Cargo, 5,506.91, pays	2,225.24	
Freight, 3,775.05, pays	1,525.43	
		$6,434.10

2d. The amount due from from James E. Ward & Co.:

(*a*) on account of general average	$2,225.24
(*b*) on account of freight	1,716.85
	$3,942.09

3d. The salvors' claim on freight, ascertained as directed in Opinion (p. 37), 45 per cent of $2,214.07, equal $996.33.

At the argument before the Commissioner, the owners of the cargo protested, and requested the Commissioner to report their protest, "that they ought not in any view, or upon any computation, to be charged with general average, or with freight upon the forty-five per cent of the cargo appropriated to salvage."

The Commissioner reports the protest as requested, but he fails to find that the assumption on which the protest is based is supported by the facts.

No part of the cargo was "appropriated to salvage." On the contrary (Opinion, p. 8) the owner obtained "delivery of the cargo, or, what is equivalent, the possession of the proceeds, after a sale made solely in his own interest"; and thereby (Opinion, p. 26) the owners "subjected themselves to the same obligation to the vessel and salvors as though they had obtained a delivery of the cargo instead of a sale thereof."

The Court accordingly directs (Opinion, p. 35) that the owners of cargo "contribute toward the general average upon the same basis as if the cargo had been carried to its port of destination and there delivered."

Such carriage and delivery would also subject cargo so carried and delivered to the payment of freight, notwithstanding the cargo so carried and delivered might also be liable to contribute toward salvage services rendered on the voyage.

That cargo saved and delivered should not pay freight and contribute toward a sacrifice voluntarily made for the sake of saving it, and which resulted in saving it, simply because a salvage service must also be contributed for, would hardly be contended by the learned counsel representing the owners of the cargo of the Eliza Lines.

The Commissioner finds that proposition contrary to established principles, and inconsistent with his understanding of the directions of the Court above referred to.

It is therefore not adopted in making up this report.

All which is respectfully submitted by

JOHN D. BRYANT,
Commissioner.

IN THE ELIZA LINES.

STATEMENT OF GENERAL AVERAGE.

Voucher.		General Average. One-third off.	Net.
No. 3.	Survey, one-half . . .	$20.00	$20.00
4.	Survey	17.50	17.50
11.	Metal	40.69	$40.69	
15.	Anchors, etc. . . .	80.36	15.36	65.00
16.	Spars	1,060.00	1,060.00	
17.	Hanks	15.00	15.00	
18.	Blocks	540.00	540.00	
19.	Riggers . . .	2,250.00	2,250.00	
20.	Boats	100.75	100.75	
22.	Carpenter, $2,082.31, allow .	500.00	500.00	
23/25.	Billings, stores, $389.45 .	389.45	389.45	
26.	Sailmaker, $1,241.77 allow .	1,000.00	1,000.00	
27.	Blacksmith, $838.00, allow .	675.00	675.00	
		$6,688.75	$6,586.25	
	One-third off for new . . .		2,195.41	4,390.84
				$4,493.34
Commission, advancing and paying on general average 5 per cent				224.67
Assessor, services rendered making report for District Court				100.00
General Average, as per report to District Court .				$4,818.01

Amount brought forward from District Court Statement, $4,818.01

Thus far the general average statement is the same made up for use in the District Court and is adopted in accordance with the suggestion contained in the Opinion at p. 34.

Proceeding with the adjustment as directed by the Court (Opinion, pp. 34-37) upon the assumption that "the cargo had been reladen and the voyage completed," the Commissioner finds that in addition to the above amount, brought forward, the following items, computed in accordance with the usage of the port of Boston, concerning which evidence was submitted, would be properly chargeable in general average:

No. 1. Look & Quinn, stevedores' charges discharging cargo, etc.		$693.50	
2. Look & Quinn, cash paid for pumping		34.40	
3. N.Y. & N.E. R.R. Co., wharfage		145.00	
4. N.Y. & N.E. R.R. Co., storage		178.19	
			1,051.09
5. Allow for jettison from deckload, say 4000 ft. at $40 per M.,	$160.00		
Less freight (not earned) thereon at $13.33	53.33		
	$106.67		
Less 10 per cent allowance for sea damage	10.67		
		$96.00	
6. Add for loss of freight on cargo jettisoned, 4000 ft. at $13.33 per M.		53.33	
7. Adjuster's fee for supplemental statement,		96.67	
8. Quinn Bros. (successors to Look & Quinn), estimated charge for reloading cargo at Boston		319.00	
			565.00

Total general average, on the assumption that the Eliza Lines had reloaded her cargo and had completed her voyage to Montevideo and Buenos Ayres . $6,434.10

OBJECTIONS OF THE OWNERS OF CARGO AND OF JAMES E. WARD & CO. TO THE COMMISSIONER'S DRAFT REPORT.

And now the draft report of John D. Bryant, Esquire, the Commissioner in this cause, having been read, the owners of cargo and James E. Ward & Co. come and make their objections to the same as follows:

1. For that the said Commissioner has taken the contributing values of different contributing interests in general average at different places and different times, when by law the same should all be taken at the same place and time.

2. For that the Court having directed that the contributing value of said bark Eliza Lines in general average should be taken to be her value on arrival at Boston on September 19, 1889, and that general average should be adjusted according to the customs prevailing at the port of Boston, the value of said cargo at Boston in said September, 1889, should have been taken as the contributing value of said cargo in general average, and the Commissioner has taken as the contributing value in general average of said cargo what he has found to have been its value at Montevideo or Buenos Ayres in January, 1890.

3. For that the Commissioner has not taken as the contributing value of the cargo in general average its value in Boston in September, 1889.

4. For that the said Commissioner has taken for the contributing value of cargo in general average what he has found to have been its value in Montevideo or Buenos Ayres in January, 1890.

5. For that the said Commissioner has taken in general average for the value of the cargo jettisoned its value in Montevideo or Buenos Ayres in January, 1890, and has not taken as the value of said jettisoned cargo in general average its value in said Boston in September, 1889.

6. For that the said Commissioner has found that the sound value at Montevideo or Buenos Ayres of the cargo of the Eliza Lines at

the time said Eliza Lines should have arrived at said Montevideo or Buenos Ayres, which the Commissioner has found to have been January 1, 1890, was $40 per thousand, and there was no competent evidence before the Commissioner of the sound value of said cargo at said Montevideo or Buenos Ayres at said time or at any other time, or any competent evidence of the value of yellow pitch pine lumber at said Montevideo or Buenos Ayres at said time or at any time, sound or unsound, and the only evidence before said Commissioner in respect to such value was incompetent, and was duly objected to by said owners of cargo and said James E. Ward & Co., and the Commissioner is requested to report to the Court all the evidence before him of the value of yellow pitch pine lumber and of said cargo of said Eliza Lines at Montevideo or Buenos Ayres at any time.

7. For that said Commissioner has found that a deduction of ten per cent from the net sound market value at Montevideo or Buenos Ayres of all the cargo of said Eliza Lines at the time when he finds said vessel should have arrived at said Montevideo or Buenos Ayres would fully cover damage to said cargo and depreciation of market value in consequence of sea perils, to which the said cargo was exposed, before the arrival of the said vessel in Boston in September, 1889, and the Commissioner is requested to report to the Court all the evidence before him on the subject of such damage and depreciation, and further to report to the Court that all the evidence contained in the record of the Circuit Court in the following causes: No. 3,545, *The Eliza Lines;* No. 3,546, *The Eliza Lines;* No. 3,547, *Cargo ex The Eliza Lines*, and No. 3,548, *Andreasen, Libellant, Appellant*, v. *295,000 feet of Lumber and Darrach et al.*, was admitted in evidence and used in evidence at the hearing before him of this cause so far as legally competent.

8. For that it appeared before the said Commissioner by the record of the Circuit Court in this cause that the bark Eliza Lines was delivered to her master by the marshal in Boston, October 5th, 1889, and in the petition of said master set forth in said record dated 18th October, 1889, it is stated that the petitioning master has partly repaired the bark and is about to complete her repairs.

And it further appears from the deposition of G. Lootz in said record that the said bark was not ready to take on cargo after her repairs until December 12, 1889. And it further appears from said record that the Court has found "that the repairs and all the proceedings by the master and vessel were conducted with great diligence" and that the vessel "was ready for sea at least as early as December," and yet the Commissioner has found that the said bark, if she had been allowed to reload her cargo and complete her voyage, would have arrived at Montevideo or Buenos Ayres by January 1, 1890, when he also finds that the average length of voyage from Boston to Montevideo or Buenos Ayres is fifty-five or sixty days, whereas said Commissioner should have found that said bark, if she had been allowed, when ready to take on cargo after her repairs as aforesaid, to reload her cargo and complete her voyage, could not have sailed from said Boston until after said 12th December, 1889, and could not have arrived at said Montevideo or Buenos Ayres before February 7, 1890.

9. For that it was agreed before said Commissioner on behalf of all the parties by their respective counsel that the average length of voyage from Boston to Montevideo at the time when said bark, if she had been allowed to reload her cargo and complete her voyage, would have been pursuing said voyage was sixty days, and the Commissioner has rejected said agreement and has found upon the evidence the average length of voyage from Boston to Montevideo or Buenos Ayres to be fifty-five or sixty days, and said Commissioner is respectfully requested to report to the Court said agreement of the parties by their respective counsel.

10. For that the said Commissioner has not deducted from the net freight, which he finds the said bark would have earned in case the cargo had been reladen and the voyage completed, the whole of the net freight found by him to amount to $1,936, which he finds the said bark earned on her voyage to Lisbon, where he finds she arrived on February 7, 1890, but has deducted only 45/83 of said net freight.

11. For that the said Commissioner in the second paragraph of

his recapitulation finds and reports the amount due from James E. Ward & Co. as follows:

(*a*) On account of general average . . .	$2,225.24
(*b*) On account of freight	1,716.85
Making a total of	$3,942.09

Whereas the said sum of $1,716.85, as appears by said Report, is the balance remaining after deducting, as ordered by the Court, from $4,474.86, being the sum of the net freight to be paid by James E. Ward & Co., $2,249.62 and the general average contribution $2,225.24 to be paid by the same, the proceeds of the cargo applied by order of the District Court towards the payment of freight, and general average amounting to $1,708.39, and further deducting 45/83 of the net freight of the Lisbon voyage, amounting to $1,049.62, so that the sum of $2,225.24 on account of general average is already included in the charges made by said Commissioner against said James E. Ward & Co., of which said sum of $1,716.85 is the balance, after the deductions ordered by the Court.

12. For that the said Commissioner has charged the said cargo owners and said James E. Ward & Co. with the net freight to Montevideo or Buenos Ayres on the whole of said cargo, when it appears that forty-five per cent of said cargo was appropriated at said Boston to the use of the salvors, and said net freight should have been charged only on the remaining 55 per cent.

13. For that the said Commissioner has taken the value of the whole cargo for its contributing value in general average, whereas it appears that forty-five per cent of said cargo was appropriated in Boston to the use of the salvors and only fifty-five per cent of said value should have been taken as the contributing value of cargo in general average.

14. For that the said Commissioner has included among the charges to be contributed for in general average a commission for advancing and paying on general average, amounting to $224.67.

15. For that while the said Commissioner has included among the charges to be contributed for in general average $96 for cargo jettisoned, and the same is included among the charges to which owners

of cargo and said James E. Ward & Co. are condemned to contribute $2,225.24, and while said sum of $96 ought therefore to be credited to said owners of cargo and said James E. Ward & Co. and deducted from the amount which they are required to contribute in general average, yet the said Commissioner has allowed to said owners of cargo and said James E. Ward & Co. no credit for said cargo contributed for as jettisoned, and has not deducted said $96 or any part thereof from the sum in which cargo is condemned in general average.

16. For that while the said Commissioner has included among the charges to be contributed for in general average $53.33 for loss of freight on cargo jettisoned, and the same is included among the charges to which owners of cargo and said James E. Ward & Co. are condemned to contribute $2,225.24, and while therefore freight receives in general average said $53.33 and the same is not lost, and ought therefore to be deducted from the net freight which said Eliza Lines would have earned if she had reloaded her cargo and completed her voyage to Montevideo or Buenos Ayres, yet in ascertaining the net freight to be $2,249.62 and in charging the same to said owners of cargo and said James E. Ward & Co. the said Commissioner has nowhere deducted said sum of $53.33, and the owners of freight are allowed to recover against said owners of cargo and said James E. Ward & Co. the whole of the net freight to Montevideo or Buenos Ayres, and also to recover in general average $53.33, thus recovering more than the whole of the net freight.

17. For that while the Commissioner in adjusting the general average has included two theoretical charges, which have not been and are not to be paid by any one, to wit: commission for advancing and paying on general average $224.67, charge for reloading cargo at Boston $319, the latter of which is admitted to be a legitimate charge in the adjustment while it is denied that the former is a proper charge in such adjustment, yet the Commissioner, after ascertaining the contributions payable by the several interests upon such theoretical adjustment, in condemning said owners of cargo and said James E. Ward & Co. to contribute $2,225.24 towards the sum of an adjustment thus made up, and including two theoretical charges

which have not been and are not to be paid by anybody, has not deducted from said sum of $2,225.24 the proportion contributed in said average by cargo to said two theoretical sums amounting to $543.67, thereby condemning said owners of cargo and said James E. Ward & Co. to pay cargo's proportion of said $543.67, when no one is entitled to receive the same.

By their Counsel and Proctors,

L. S. DABNEY.
F. CUNNINGHAM.

Received November 8, 1897.
JOHN D. BRYANT, *Commissioner.*

COMMISSIONER'S SUPPLEMENTAL REPORT.

The Commissioner's draft Report in the above-entitled cause was read to the parties on the seventh day of October, 1897, and it was then agreed between counsel for the respective parties that the Report be retained by the Commissioner until the eighth day of November, 1897, and that objections to the Report might be filed with the Commissioner by any party on or before that date. On the eighth day of November, 1897, the objections of Messrs. Dabney & Cunningham in behalf of owners of cargo and of James E. Ward & Co., which are herewith filed, were presented to the Commissioner and have been duly considered by him.

The Commissioner makes no change in his Report by reason of objections 1, 2, 3 and 4.

The contributory values taken by the Commissioner are (as stated in his Report, p. 2 [p. 242]) taken in accordance with what he understands to be the instruction of the Court on that subject, namely:

Opinion, p. 35:

"The first step will be to determine the amount . . . the freight and cargo contribute to general average. . . . The value of the vessel on arrival at Boston will be taken at $2,250. In other respects general average will be adjusted on the same principles as

though the voyage had been subsequently completed, and according to the customs prevailing at the port of Boston."

Objections 1, 2, 3 and 4 are therefore overruled.

The Commissioner makes no change in his Report by reason of objection 5.

The value taken by him at which jettisoned cargo is to be contributed for in general average is in accordance with what he understands to be the direction of the Court, and with the established rule of law on that subject, namely: that—

"if the vessel arrives at port of destination the value . . . of jettisoned cargo should be the net price for which the cargo might have been sold there."

The Court has directed (Opinion, p. 35) that the average be adjusted "on the same principles as though the voyage had been subsequently completed."

Therefore, the net value, as ascertained by the Commissioner, at port of destination of the jettisoned cargo is taken as the value at which such cargo should be contributed for in general average.

Objection 5 is therefore overruled.

The Commissioner makes no change in his Report by reason of objection 6, and overrules it.

This objection is to the effect that there was no competent evidence before the Commissioner of the sound value of the cargo referred to. The objection is accompanied by the request that the Commissioner report to the Court all the evidence before him on this subject. The Commissioner refers to page 7 [p. 246] of his Report, and further reports the following from the stenographer's report of the examination of Coolidge S. Roberts, of the firm of C. S. Roberts & Co.:

"Q. What is your occupation?

"A. Commercial; in the South American business; in trade with the Argentine Republic.

"Q. And whereabout in the Argentine Republic do you conduct your business?

"A. In Buenos Ayres, the headquarters.

"Q. Does any portion of your business consist in the shipping of cargoes of hard pine lumber from the United States of America to the Argentine Republic or in receiving such shipments there?

"A. We do, yes.

"Q. Are you acquainted with the market prices of hard pine lumber in Buenos Ayres or Montevideo on or about the first of January, 1890?

"A. Yes.

"Q. Please to state what the market price of hard pine lumber was at Buenos Ayres or Montevideo on January 1st, 1890, or as near thereto as you can.

"Mr. Dabney: I object. I will state the objection.

"The Commissioner: Do you want a ruling on it?

"Mr. Dabney: Yes, I want a ruling upon it. My objection is that it is wholly immaterial for the reason that the value of the cargo, under the decision of the Court, is its value in Boston. And the value at Montevideo or Buenos Ayres or anywhere else has nothing to do with it.

"Mr. Lowell: If that is so, I do not understand the opinion of the Court.

"The Commissioner: For the present I will overrule the objection and let the evidence go in *de bene*.

"Mr. Lowell: The opinion of the Court is: 'In making up the judgment and decree rendered necessary by this opinion, the first step will be to determine the amounts the freight and cargo contribute to general average.' This is page 35: 'For this purpose the Commissioner will accept as general average charges the masts which were cut away to right the vessel. The value of the vessel on arrival at Boston will be taken at $2,250. In other respects general average will be adjusted on the same principles as though the voyage had been subsequently completed, and according to the customs prevailing at the port of Boston.'

"The Commissioner: I should like to ask the counsel at this stage if they understand this general average adjustment is to be made up as if the vessel had put in to Montevideo after the disaster, and as if that were the port at which the adjustment was to be made?

"Mr. Lowell: I so understand it.

"Mr. Dabney: I do not so understand it.

"Mr. Dodge: I understand that is the view Judge Putnam takes of it in his opinion.

"The Commissioner: Mr. Dabney saves his objection.

"Q. Now, Mr. Roberts, will you kindly answer the question?

"A. The market value at that time was from $39 to $41, Argentine gold, on board the vessel.

"Q. Do I understand that to be the price per thousand superficial feet?

"A. Per thousand superficial feet.

"Q. And was there at that time any discount or advance upon Argentine gold as compared with American gold?

"A. The Argentine dollar, to put it into the American dollar, is reduced at 1.0364.

"Q. (By Mr. Dabney.) I do not understand that, Mr. Roberts. Which is worth 1.0364?

"A. The American dollar is worth 1.0364 Argentine dollars.

"Q. (By Mr. Dodge.) A discount of three and a half per cent?

"A. About that; substantially three and a half per cent.

"Q. Are you able to state, Mr. Roberts, for how long a time subsequently to January 1st, 1890, the market prices continued to be as you have stated?

"A. Subsequently?

"Q. Yes.

"A. I couldn't say without looking that up from my correspondence.

"Q. Could you say whether it continued for two months subsequent to January 1st, 1890?

"A. I could say that it continued all through January, but I have not the data with me beyond January.

"Q. The cargo concerning which we are inquiring here has been described as a cargo of re-sawed yellow pitch pine lumber. There is evidence that it was in ten or twelve different sizes, suitable for building purposes, but unsuited for the Boston market. Please to state whether or not the cargo described as I have now stated is the

kind of cargo to which you referred in stating the price in Buenos Ayres?

"A. Well, we invoice,— the lumber is invoiced 'un-sawn'—

"Q. Re-sawn?

"A. Re-sawn yellow pine,— pitch pine lumber. And the sizes,— we ship ten or a dozen or fifteen different sizes, more or less. But I do not know what sizes comprised this cargo. If I saw the assortment, I could tell.

"Q. For what purposes do you ship lumber to Buenos Ayres?

"Mr. Dabney: I object to that.

"Q. Or the kind of lumber to which you have referred in giving us the prices.

"Mr. Dabney: I would like to have my objection noted to that.

"The Witness: Shall I answer?

"Q. Yes.

"A. Will you please repeat the question?

"(*The question was then read.*)

"Q. For what purpose is it to be used, I mean?

"A. We send it there for sale, for the purpose of re-selling in the market there. Does that answer the question?

"Q. What I desired to know, if I could learn, was, for what purposes it was suited in particular, if any?

"A. All purposes. It is a difficult question to answer categorically. Flooring for bridges, for railway wagons. Many,— many different purposes.

"Mr. Dabney: Where do you find 're-sawed,' Mr. Dodge?

"Mr. Dodge: You will find it either in the charter party or bill of lading,— page 37.

"Mr. Dabney: It is not in the bill of lading.

"Mr. Cunningham: It is on page 35, of the charter party.

"Q. Are you able to state the average length of passage from Boston to Buenos Ayres or Montevideo in the months of October, November and December?

"A. The ordinary passage would be, in those months, I think, fifty to sixty days.

"Mr. Lowell: On page 35, in the charter party, is 're-sawn pitch-

pine lumber.' And in the bill of lading, page 37, is 'yellow pitch-pine lumber.'

"Q. Is there any difference, Mr. Roberts, between pitch-pine lumber and yellow pitch-pine lumber, commercially?

"A. I never heard of any difference, no; it is one and the same."

On cross-examination this witness testified in part as follows:

"Q. (Mr. Dabney.) Mr. Roberts, are you a member of any firm?

"A. I am.

"Q. What is the firm?

"A. C. S. Roberts & Co.

"Q. And where is their place of business?

"A. Buenos Ayres.

"Q. Who are your partners, please?

"A. Frederick C. Cook of Buenos Ayres.

"Q. In January, 1890, were you there in Buenos Ayres?

"A. I was not.

"Q. When was the time, nearest to that, that you were there?

"A. November, 1889.

"Q. Where were you in January, 1890?

"A. I was in Boston.

"Q. How do you know what the market price was in Buenos Ayres at that time?

"A. From letters written to N. W. Rice & Co., and I think to myself, from our house in Buenos Ayres.

"Q. That is, your only knowledge is what somebody wrote you?

"A. From our house in Buenos Ayres, giving — shall I continue?

"Q. No.

"Mr. Dodge: We would be very glad to have him continue, Mr. Dabney.

"Mr. Dabney: He has answered my question.

"Q. Now, how many such letters did you receive in January?

"A. I have records here of two, but I know we received other letters. I couldn't say now how many we received, but several.

"Q. Have you lately examined two?

"A. I got our stenographer.

"Q. You got what?

"A. I got our stenographer to examine the letters.

"Q. And make copies of them?

"A. Make copies of extracts.

"Q. And how many letters did he extract from? Do you know?

"A. Two.

"Q. You have not looked at the letters?

"A. I did not look at the letters, no, except —

"Q. And your knowledge is derived from extracts made from two letters, by your stenographer?

"A. Yes, sir."

On redirect examination the witness testified:

"Q. (By Mr. Lowell.) Mr. Roberts, was it part of your business in 1890 to know the rates of lumber — the value of lumber — in Montevideo and Buenos Ayres?

"A. In Buenos Ayres; yes, sir.

"Q. In Buenos Ayres?

"A. Yes, sir.

"Q. The market of Montevideo is substantially the same, is it not?

"A. It might or might not be. There are variations. There is quite a difference between the two markets.

"Q. If a person had the choice, at any given time, to go to whichever market he chose, he would be likely to choose the one that at that time was the highest, would he not?

[*Question objected to by Mr. Dabney.*]

"A. Yes, sir; certainly."

W. P. Truesdell, a witness called and examined by Mr. Dodge in behalf of Black, testified that he was stenographer for N. W. Rice & Co. and C. S. Roberts & Co., who did a business on joint account; that he had the charge of, or access to, the correspondence of those firms with the members of the firm at Buenos Ayres, and was acquainted with the handwriting of the members of the firm in Buenos Ayres. Mr. Truesdell produced letters, which he testified (subject to objection and exception by Mr. Dabney, representing James E. Ward & Co.) were original letters written from Buenos Ayres by Mr. F. S. Cook, the partner there of C. S. Roberts & Co.; one dated January 18, 1890, reporting a sale of pitch pine at $39 gold

on board, and one dated January 24, 1890, reporting sale of the "Chapman's" assortment at $40 gold per thousand feet on board.

Mr. Truesdell also produced what he testified were the original accounts of sales made in Buenos Ayres, early in 1890, of cargo of pitch pine or hard pine lumber from the "Amor" and the "Chapman."

There was further testimony by the witnesses Roberts and Truesdell, both on direct and cross-examination, which did not modify or affect the conclusions reached by the Commissioner, and which the Commissioner does not deem it his duty to transcribe and embody in his Report.

If either party desires that further testimony of any witness on this subject accompany this Report, and will seasonably prepare and submit to the Commissioner a correct transcript of such testimony, the Commissioner will identify and annex the same to his Report.

The Commissioner makes no change in his Report by reason of objection 7.

In partial compliance with the request which accompanies said objection, that the Commissioner —

"report to the Court all the evidence before him on the subject of such depreciation and damage, and further . . . report to the Court that all the evidence contained in the record of the Circuit Court in the following causes: No. 3,545, *The Eliza Lines;* No. 3,546, *The Eliza Lines;* No. 3,547, *Cargo ex The Eliza Lines,* and No. 3,548, *Andreasen, Libellant, Appellant,* v. *295,000 feet of Lumber and Darrach et al.*, was admitted in evidence and used in evidence at the hearing before him of the cause so far as legally competent,"

the Commissioner states that the printed records in the several Circuit Court causes, No. 3,545, No. 3,546, No. 3,547, No. 3,549 and No. 3,550, by whatever name the causes so numbered may be correctly designated, were produced before him at the hearing and were referred to by the several parties, so far as they saw fit, and by the Commissioner in making up his Report.

As stated in the Report, the evidence was conflicting as to the deduction to be made from sound value of cargo by reason of damage

by sea perils. Part of the testimony on this subject is already set forth in the Commissioner's Report.

The Commissioner does not feel it incumbent on him to collate and embody in his Report all the evidence on the subject of such damage; but if either party desires to embody the same in a schedule or exhibit to accompany the Commissioner's Report, the Commissioner will identify such schedule or exhibit, if seasonably furnished, and will file the same with his Report. Such evidence has already been before the Commissioner. His conclusions are unchanged.

Objection 7 is overruled.

The Commissioner makes no change in his Report by reason of objections 8 and 9.

The Commissioner was directed by the Court (Opinion, p. 36) to "estimate approximately the date at which the Eliza Lines would have earned her freight under the charter in the case at bar if she had been allowed to reload her cargo and complete her voyage."

The Commissioner understands this to mean, if she had been allowed to prosecute her business in the usual course, under the management of her agents at this port, Messrs. Gill & Lootz, and to reload her cargo and complete her voyage without the interruption of proceedings in the District Court, which proceedings the Commissioner understands the Circuit Court found (Opinion, pp. 5, 6, 8 and 26) unjustifiable.

If this understanding of the direction above quoted is correct, it is quite immaterial at what dates certain things happened, under, and in spite of, such unjustifiable interruption.

The evidence upon which the Commissioner finds the Eliza Lines would have arrived at Montevideo or Buenos Ayres, "if she had been allowed to reload her cargo and complete her voyage" without such interruptions, is set forth as fully as the Commissioner deems necessary in his Report (pp. 11 *et seq.* [pp. 249 *et seq.*]).

Upon the fact there found that the Eliza Lines would have been ready to resume her voyage October 27, 1889, the conclusion reached that she would have arrived at Montevideo or Buenos Ayres by January 1, 1890, is equally consistent with a voyage of fifty-five days,

as testified to by several witnesses, or of sixty days, which the objectors say is the time agreed by counsel, which agreement is recognized by counsel at the reading of this Report.

The difference is immaterial. Whichever is taken as the fact would bring the vessel to Montevideo or Buenos Ayres "by or before January 1, 1890," as found and reported by the Commissioner.

Objections 8 and 9 are therefore overruled.

The Commissioner makes no change in his Report by reason of objection 10, which is, in effect, that the Commissioner has not deducted the whole of the net freight, found by him to amount to $1,936, but has deducted only 45/83 of said net freight.

The Opinion (pp. 35, 36) directs the Commissioner to ascertain the actual date at which the Eliza Lines completed earning her freight on her voyage out of Boston (the Lisbon voyage), and the date at which she would have earned her freight under the charter in the case at bar (from Pensacola to Buenos Ayres) if she had been allowed to reload her cargo and complete her voyage.

"If the latter date anticipates the former date, he will compute *pro rata* the net freight so earned based on periods computed from Nov. 16, 1889, and deduct the result as already directed."

The latter date (under the Pensacola charter) has been found to be January 1, 1890. The former date (to Lisbon) has been found to be February 7, 1890.

The Commissioner was, upon these findings, bound by the direction of the Court to deduct only a proportion (found to be 45/83) of the net freight and not the whole net freight.

Objection 10 is therefore overruled.

The Commissioner makes changes in his Report in consequence of objection 11.

The further consideration of this objection and the detailed statement of the consequent changes of the Commissioner's original draft Report is placed at the end of this Report, and after the consideration of subsequent objections, in order that such further changes

may be included as such consideration may show ought to be made in the Commissioner's draft Report.

The Commissioner does not modify his Report by reason of objections 12 and 13 thereto, to the effect that freight should not be charged nor general average contribution assessed upon the 45 per cent of the cargo which it is alleged in the objection was "appropriated at said Boston to the use of the salvors."

This subject was discussed at the argument, has been considered by the Commissioner and passed upon in his Report, pp. 11 and 12 [pp. 249, 250]. For the reasons there set forth, objections 12 and 13 are overruled.

The Commissioner does not modify his Report by reason of objection 14.

The commission to which objection was made was one of the items in the adjustment made in the District Court, and the Commissioner is instructed (Opinion, p. 34) "to adopt, so far as practicable, the work done in that direction in the District Court."

Independently of that instruction, the right to include among general average charges a suitable commission for collecting and disbursing seems fully established by judicial decisions on that subject.

See *Barnard* v. *Adams*, 10 Howard, 270.
Sturgess v. *Cary*, 2 Curtis, 382-385.

The amount of the commission in this case seems to have been approved by the District Court, and to have been practically confirmed by the Circuit Court in the direction above quoted.

Objection 14 is therefore overruled.

The Commissioner modifies his Report by reason of objection 15. The Commissioner is of the opinion that the credit of $96, referred to in said objection, should be allowed.

He therefore sustains objection 15, and modifies his Report accordingly.

Upon consideration of objection 16, the Commissioner is of

opinion that in estimating the amount due from James E. Ward & Co. on account of freight there should be deducted in the first instance from the gross freight from Pensacola to Buenos Ayres ($5,662.57, Report, p. 10 [p. 248]) the proportion ($53.33) of this gross freight which pertains to cargo jettisoned, and upon which freight was not earned. This amount was made up by contribution in general average, cargo contributing its share. Clearly it should not be paid again by James E. Ward & Co., representing the cargo, and should be deducted from the amount otherwise found due from James E. Ward & Co. on account of freight.

Objection 16 is therefore sustained, and the Commissioner modifies his Report accordingly.

The Commissioner does not modify his Report by reason of objection 17.

The charges referred to in the objection as "theoretical" are only two of numerous items in the adjustment which might with equal propriety be so characterized.

For reasons clearly set forth in the Opinion, the Opinion (p. 35) directs that the general average adjustment be made "on the same principles as though the voyage had been subsequently completed."

This was the theory on which the adjustment was based. The voyage was not in fact completed. Many of the items in the adjustment might therefore be called "theoretical." Such items are none the less admissible under the instructions of the Court.

If the voyage had been completed and cargo delivered, the owner of the Eliza Lines would have been entitled to receive from James E. Ward & Co., as representing cargo, cargo's share of the amounts referred to in objection 17, which are included in the general average statement, made up on the theory, directed by the Court, that the voyage was completed and cargo delivered.

To deduct from James E. Ward & Co.'s contribution to the general average, so made up, their proportion of such charges, would nullify to that extent, as to them, an adjustment made in accordance with the directions of the Court, by which they are found liable to contribute to general average charges as in the adjustment set forth.

Objection 17 is therefore overruled.

To return now to objection 11:

The recapitulation and summary referred to in that objection are not necessary parts of the Commissioner's Report. They were intended to present, in concise form, the results previously reached in the Report.

On consideration of objection 11 it is apparent to the Commissioner that he has failed correctly to present those results in his recapitulation and summary.

It is further apparent to the Commissioner that in order correctly to embody in his recapitulation the figures reached in pursuance of the specific directions of the Opinion, which constitutes the commission in this case, paragraph 2 of the recapitulation should consist of one item and should read, in substance, as follows:

"2d. The amount due from James E. Ward & Co. on account of both freight and general average, as per Report, p. 12 [p. 250], $1,716.85."

The corrections made in consequence of the subsequent objections which are allowed by the Commissioner (objections 15 and 16) would modify those figures as follows:

From the balance of		$1,716.85
apparently due from James E. Ward & Co., on the theory on which the draft Report proceeds, must be deducted the items of credit claimed in objections 15 and 16, and allowed by the Commissioner, namely:		
Freight not earned on cargo jettisoned .	$53.33	
Value of cargo jettisoned and contributed for in general average . . .	96.00	
	$149.33	
From this, however, must be deducted an excess in the allowance of one-third of gross freight which before was computed on the entire gross charter		

Amount brought forward		$1,716.85
freight ($5,662.57), instead of on that amount, less freight, no longer at risk by reason of jettison of cargo, $53.33. The excess is	17.77	
Leaving as net credit after making these corrections		131.56
and changing the balance which, *on this theory*, would be due from James E. Ward & Co. on account of freight and general average, from $1,716.85 (as per draft Report, p. 12 [p. 250]) to . . .		$1,585.29

And this amount, reached by the application of the specific directions contained in the Opinion to the facts found by the Commissioner, and after making the corrections suggested in the objections which are sustained by the Commissioner, the Commissioner is obliged to find and report, upon the mode of procedure which he understands the Opinion to direct, as the total amount due from James E. Ward & Co. on account of freight and general average.

But this balance on account of *both* freight and general average is less than the amount which has already been found due from James E. Ward & Co. on account of general average alone.

It must therefore be erroneous.

The Commissioner observes that on p. 34 of the Opinion the Court says:

"We would be glad to receive from either party suggestions touching any error into which we may have fallen with reference to the details of the adjustment to be made in accordance with the principles of this Opinion."

If the same privilege be extended to the Commissioner, or if he may exercise it without impropriety as *amicus curiae*, he would respectfully suggest that the credit to James E. Ward & Co., toward their indebtedness to the owners of the Eliza Lines, of freight's contribution to general average (Opinion, p. 36) is a credit to which they are not entitled.

The general average is paid by contribution from three distinct interests, ship, cargo and freight.

The cargo owner's obligation in regard to general average contribution is discharged when he has paid the contribution to which cargo is found liable.

The cargo owner's obligation in regard to freight is discharged when he has paid to the ship owner the amount of freight found due in respect to his cargo.

What the freight so paid is to contribute to general average is a matter which does not concern the cargo owner. He is not liable therefor. To credit the cargo owner, toward a general average contribution due from him, or toward freight due from him, with a payment he has not made and for which he is not liable, is to relieve him to that extent of a debt he owes to the ship owner.

The Opinion proceeds throughout on the theory that James E. Ward & Co., as representing cargo, are indebted to the owners of the Eliza Lines on two separate and distinct grounds.

1st. (Opinion, pp. 26, 34, 36.) For cargo's contribution to general average.

2d. (Opinion, pp. 26, 35, 36.) For freight which the Court finds they must pay as a consequence of having procured a sale of the cargo, which sale the Court finds unjustifiable.

The Commissioner has found, and has reported, that James E. Ward & Co., as representing cargo, should contribute to general average, $2,225.24.

The steps by which this result was reached are fully set forth in the draft Report, pp. 6-9 [pp. 245-248].

The Commissioner now asks leave to pursue the inquiry as to James E. Ward & Co.'s liability on account of freight — independently of any other liability — but in strict accordance in other respects with the directions of the Court; to credit James E. Ward & Co., in connection with that inquiry, with the amounts claimed in the objections which the Commissioner has allowed to the draft Report, and to make the corrections consequent on such credit; to add to the amount so obtained the amount which James E. Ward &

Co., as representing cargo, are found liable to contribute on account of general average; and to compare the total so obtained with the result already reached by a different process.

1st. To ascertain James E. Ward & Co.'s liability on account of freight.

From gross freight from Pensacola as per charter (Report, p. 10 [p. 248]; Opinion, p. 36),	$5,662.57	
Less (as per obj. 16) freight on cargo jettisoned and contributed for in general average,	53.33	$5,609.24
Deduct one-third, as per custom of Boston, to cover charges of earning and to give net freight		1,869.75
Gives net freight from Pensacola		$3,739.49
Credit 45/83 of net Lisbon freight, as found by the Commissioner (Opinion, pp. 36, 37; Report, pp. 11, 12 [pp. 249, 250])		1,049.62
		$2,689.87
Credit, further, the amount applied by order of the District Court toward freight (Opinion, pp. 34, 36; Report, 10, 11 [pp. 248, 249])		1,708.39
Leaves balance due from James E. Ward & Co. on account of freight		$981.48

2d. To this add the amount found due (Report p. 9 [p. 248]),

from James E. Ward & Co., as representing cargo, on account of general average	$2,225.24	
less (as per obj. 15) amount due for cargo jettisoned and contributed for in general average (Report, p. 17 [p. 254])	96.00	2,129.24

and we have —

3d. The total amount due from James E. Ward & Co.,

on account of freight and general average $3,110.72

instead of the two items (*a*) $2,225.24 and (*b*) $1,716.85, total, $3,942.09, stated in the recapitulation (p. 13 [pp. 251, 252]) of draft Report, now corrected, and instead of the single sum of $1,716.85, stated in objection 11 to be the balance after the deductions ordered by the Court.

That this amount of $3,110.72 must, upon the principles which the Court obviously intended to lay down in the Opinion, as applied to the Commissioner's findings of fact embodied in his Report, be the correct amount due from James E. Ward & Co. on account of freight and general average combined, may perhaps be made clearer by putting the items in the form of a ledger account between James E. Ward & Co. and the owners of the Eliza Lines, thus:

JAMES E. WARD & CO. IN ACCOUNT WITH OWNERS OF ELIZA LINES.

Dr.		Cr.	
To freight, as per Charter, from Pensacola to Buenos Ayres, $5,662.57		By deduction of one-third, as per custom of Boston, to reduce gross freight to net, as per order of Court, — say one-third of $5,609.24	$1,869.75
Less freight on jettisoned cargo	53.33	By amount paid in general average for cargo jettisoned	96.00
	$5,609.24	By 45/83 net earnings of the Eliza Lines on Lisbon voyage	1,049.62
To cargo's contribution to general average	2,225.24	By cash through District Court from sale of cargo	1,708.39
		By balance due from James E. Ward & Co. on account of freight and general average	3,110 72
	$7,834.48		$7,834.48

On page 18 [pp. 272, 273] of this Supplemental Report the Commissioner reported that by the strict application of the specific directions of the Opinion, as he understood such directions, to the facts as found by him, the total amount due from James E. Ward & Co. on account of both freight and general average would be $1,585.29

If to that amount be added 1,525.43

which is the amount noted on page 9 of the draft Report [p. 248] as freight's contribution to general average (and which is deducted in the preceding computation (draft Report, p. 10 [p. 248]) from the amount otherwise due from James E. Ward & Co.), it gives the total which by computing separately James E. Ward & Co.'s liability (*a*) on account of general average, (*b*) on account of freight, and adding the results, is found to be due on both accounts from James E. Ward & Co., namely . $3,110.72

And this amount of $3,110.72, if it is open to the Commissioner to deviate to this extent from what he understands to be the specific directions of the Opinion (p. 36) in regard to the deduction of freight's contribution to general average, or if the Commissioner has in this respect misunderstood the Opinion, or if the Opinion should be modified in this detail, the Commissioner finds and reports to be the correct amount due from James E. Ward & Co. on account of freight and as cargo's contribution to general average.

Otherwise, and as an alternative finding, if the finding last above named is not open to the Commissioner, the Commissioner must find and report as hereinbefore set forth, that as the result of the several steps of procedure specifically laid down in the Opinion, as understood by the Commissioner, and applied to the facts found by the Commissioner, the total amount due from James E. Ward & Co. is fifteen hundred eighty-five 29/100 dollars ($1,585.29).

The original draft Report, the objections thereto in behalf of owners of cargo, and this Supplemental Report, in modification of the original draft Report, are respectfully submitted by

JOHN D. BRYANT, *Commissioner.*

OBJECTIONS OF THE OWNERS OF CARGO AND OF JAMES E. WARD & CO. TO THE COMMISSIONER'S DRAFT REPORT AND SUPPLEMENTAL REPORT.

And now the draft Report and Supplemental Report of John D. Bryant, Esquire, the Commissioner in this cause, having been read, the owners of cargo and James E. Ward & Co. come and make their objections to the same as follows:

They insist upon their objections to the draft Report presented to said Commissioner on the eighth day of November, 1897, as appears by his Supplemental Report, which have been overruled and disallowed by said Commissioner, namely, the objections numbered from 1 to 10 inclusive, 12, 13, 14 and 17, in manner and form as presented to said Commissioner as aforesaid, and pray to make the same as so presented a part of these objections, and to have the same benefit therefrom as though the same had been here severally repeated. They also make the following additional objections:

18. For that it appears from the evidence reported by said Commissioner, and returned by him with his Report, that there was no evidence before him that in January, 1890, or at any other time, yellow pitch pine lumber, or such lumber as constituted the cargo of said Eliza Lines, was worth at said Montevideo or Buenos Ayres forty United States dollars per thousand feet, the value of the same found by said Commissioner.

19. For that said Commissioner in allowing the objection numbered 16 of said objections, which objection claims that the sum of $53.33 allowed in general average for loss of freight on jettisoned cargo should be deducted from the freight charged against said owners of cargo and said James E. Ward & Co., instead of deducting the whole of said sum of $53.33, has deducted only two-thirds thereof, being the sum of $35.56, while leaving the amount to be contributed for in general average for freight lost by jettison of cargo, the full sum of $53.33. If only net freight lost is to be deducted from the amount be charged against James E. Ward &

Co., then only net freight lost and not gross freight lost is the amount to be allowed and contributed for in general average for loss of freight. Gross freight, as per charter party, after deducting one-third, appears, by the report, to be $3,775.05, which is the full amount of net freight without loss. But the sum of the amounts for freight allowed by the Commissioner in his draft report and supplemental report, namely, $3,739.49, against James E. Ward & Co., and $53.33 in general average is $3,792.82, being in excess of the greatest possible amount of net freight.

20. For that the said Commissioner has allowed in general average to freight, for loss of freight on jettisoned cargo, the gross freight of the same to Montevideo or Buenos Ayres, as per charter party, being $53.33, whereas he should have allowed only net freight, and should have deducted one-third from said gross freight and have allowed only $35.56.

21. For that the said Commissioner in declaring that the balance found in conformity with the directions of the Court to be due from James E. Ward & Co. on account of both freight and general average must be erroneous, because less than the amount found to be due from said James E. Ward & Co. on account of general average alone, has overlooked the fact that said balance is less because there has been deducted from it the sum of $1,798.39 already applied in the District Court in payment of freight and general average from proceeds of sale of cargo, and by deducting also the net freight found to have been otherwise earned by the bark Eliza Lines, amounting to $1,049.62.

22. For that the said Commissioner in allowing the objection numbered 11 has departed from the directions given by the Court for the ascertainment of the amount due from James E. Ward & Co. for freight and general average, and, in the capacity of *amicus curiae*, has suggested a different rule from that laid down by the Court.

23. For that the said Commissioner has reported $3,110.72 as the amount due from James E. Ward & Co. for freight and general average.

24. For that the said Commissioner, while finding that the amount

due from said James E. Ward & Co. for freight and general average in conformity with the directions given by the Court is the sum of $1,585.29, has not reported said sum of $1,585.29 so found in conformity with said directions to be the amount due from said James E. Ward & Co. for freight and general average, but has reported a different and a larger sum.

25. The Commissioner is respectfully requested to report to the Court all the evidence before him in the case.

By their Proctors and Counsel,

L. S. DABNEY,
F. CUNNINGHAM.

Received December 10, 1897.

JOHN D. BRYANT, *Commissioner.*

COMMISSIONER'S SECOND SUPPLEMENTAL REPORT.

The Commissioner's Supplemental Report in the above-entitled cause was, after due notice to the parties, read to them on the twenty-sixth day of November, 1897. It was then agreed between counsel for the respective parties that the Supplemental Report be retained by the Commissioner until the eleventh day of December, 1897, and that objections to the Supplemental Report might be filed with the Commissioner by any party entitled to object thereto on or before that date.

On the tenth day of December, 1897, the objections of Messrs. Dabney and Cunningham in behalf of the owners of the cargo and of James E. Ward & Co., which are herewith filed, were presented to the Commissioner and have been duly considered by him.

The Commissioner makes no change in his Report and Supplemental Report, or in either of them, by reason of the repetition of objections already made and overruled.

The Commissioner makes no change in his Report and Supplemental Report, or in either, by reason of additional objection numbered 18,

which the Commissioner understands to be, in effect, a repetition of objection numbered 6, already overruled, to his draft Report.

Objection 18 is overruled.

The Commissioner makes no change in his Report and Supplemental Report, or in either, by reason of additional objection numbered 19.

The Commissioner intended to deduct (see p. 15 [pp. 270, 271] of his Supplemental Report), and understands that he has deducted, in either mode of computation set forth in his Supplemental Report (see pp. 18, 21 and 23 [pp. 272, 273, 274, 275, 276]), the entire amount of $53.33, allowed in general average for loss of freight on jettisoned cargo, from the gross charter freight ($5,662.57), and has taken the balance only as the basis of the further computations directed by the Court.

Objection 19 is overruled.

The Commissioner makes no change in his Report and Supplemental Report, or in either, by reason of additional objection 20, and overrules the same. See *The Irrawaddy*, 82 Fed. Rep. 472, 478, and cases there cited.

The Commissioner refers to objection 16 (allowed by the Commissioner) and to the changes made in his draft Report in consequence of such objection. (Supplemental Report, pp. 15, 18, 21, 23 [pp. 270, 271, 272, 273, 274, 275, 276].)

The Commissioner makes no change in his Report and Supplemental Report, or in either, by reason of additional objection 21, and overrules the same.

The Commissioner refers to pp. 19 to 24, inclusive, [pp. 273 to 277] of his Supplemental Report, and to the computations there set forth, in which are credited to James E. Ward & Co. both the items of $1,708.39 and $1,049.62, referred to in objection 21, and which still show a balance due from James E. Ward & Co., on account of freight and general average, of $3,110.72.

The Commissioner makes no change in his Report and Supple-

mental Report, either or both, by reason of additional objection 22, and overrules the same.

The Commissioner has followed throughout the directions of the Court laid down in the Opinion, as he understands such directions, and has made findings in accordance therewith. He has, in addition thereto, as *amicus curiae*, called attention to what, for reasons stated, seemed to the Commissioner an inadvertence in such directions, and has stated what would be the result of correcting the same if the Court finds the correction suggested ought to be made. The Commissioner leaves it to the Court to determine whether that is a "departure from the directions given by the Court," and to deal with it accordingly.

The Commissioner makes no change in his Report and Supplemental Report, either or both, by reason of objections 23 and 24, and overrules the same.

The Commissioner has not reported $3,110.72 as the amount absolutely due from James E. Ward & Co. for freight and general average, but has reported that sum only as an alternative finding if the rule of computation suggested in his Report should be adopted as in that respect and to that extent the true rule.

The Commissioner *has* reported $1,585.89 to be the amount due from James E. Ward & Co. for freight and general average, in conformity with the directions contained in the Opinion, if the Commissioner rightly understands those directions, and if they are to remain unchanged. See Supplemental Report, pp. 18, 19, 24 [pp. 272, 273, 277].

The Commissioner has not felt at liberty, under the terms of the Commission, to make an absolute finding which should be at variance with the directions contained in the Commission, or to consider or allow objections which should involve his overruling the explicit directions of the Court.

He has therefore made alternative findings as above stated.

In compliance with the request (25) with which the list of additional objections concludes, the Commissioner further reports that the deposition of W. P. Truesdell, a witness examined in behalf of vessel and salvors, was put in evidence at a hearing before him, and

that the only witnesses examined before him at the hearings were Coolidge S. Roberts, Bradford Darrach, Theodore W. Gore and Gjert Lootz.

That the testimony of Roberts, Darrach and Gore were taken down by a stenographer, and what purports to be a full transcript thereof has been furnished to the Commissioner. At the beginning of the testimony of Mr. Lootz, at two of the hearings, no stenographer was present, and the introductory interrogatories were propounded and answered without being taken down by a stenographer. The remainder of Mr. Lootz's testimony was taken by a stenographer, and what purports to be a transcript thereof has also been furnished to the Commissioner. Such transcripts are identified by the Commissioner and are filed with the Commissioner's report, and are believed by the Commissioner to be correct reports of the testimony they purport to transcribe.

No documentary evidence was before the Commissioner other than the deposition above referred to and that produced and put in by the witnesses, and that contained in the records, already referred to in said Supplemental Report.

The Commissioner further reports that on the 11th day of December, 1897, the annexed communication from Edward S. Dodge and others, Proctors for the several parties indicated by their signatures, was presented to the Commissioner, which the Commissioner identifies and files with his Report.

The Commissioner further certifies that his attention was called to the points set forth in said communication, — one of which, that designated "(*b*)", had already had the attention of the Commissioner, and in consequence of which an alternative finding, with the reasons therefor, is set forth in his Supplemental Report.

The Commissioner further states that the Proctor for Black and others, Libellants, in behalf of himself and other Proctors, signers of said communication, stated to the Commissioner that while they considered the directions of the Opinion erroneous in the particulars designated they did not feel at liberty to file objections to the Commissioner's report, because it was apparent that the Commissioner had in those particulars followed the directions embodied in the Opinion

under the authority of which the Commissioner was acting in this cause.

Before the Commissioner accepted the appointment, and as an inducement to such appointment, he was promised the assistance of an average adjuster in figuring out and formulating such adjustments as he might find called for by the Opinion and under such directions as the Commissioner might give therefor.

As Mr. Theodore W. Gore had already stated an adjustment in the District Court, the Commissioner has availed himself of the continued assistance of Mr. Gore in formulating and stating an adjustment in accordance with what the Commissioner understands to be the directions contained in the Opinion. Mr. Gore's compensation for the time and services thus rendered is included in the taxation of costs as well as the Commissioner's fee for time and services, both as more fully set forth in the statement thereof filed herewith.

All which is respectfully submitted by

JOHN D. BRYANT,
Commissioner.

BOSTON, December 10, 1897.

JOHN D. BRYANT, Esq., *Commissioner:*

Dear Sir,—We respectfully request that you will annex to your report as Commissioner, in the cases *The Eliza Lines, her Cargo and Freight*, this letter, or some form of memorandum, by which it shall appear upon the Record that we have, hitherto, called your attention, as Commissioner, to the following points, which we consider erroneous, in the instructions of the Court directed to you as Commissioner, as to the rules and principles to be followed by you in the performance of your duties, viz.:

(*a*) In that you are directed to credit to James E. Ward & Co. the proceeds of the cargo in the registry, or any part thereof (Opinion, *e.g.*, pp. 34, 36, 38), and in that they are so credited; or, in that it is directed that such proceeds, or any part thereof, are to be in any way applied to freight, or general average, either or both, or any part thereof; and in that they are so applied.

It seems to us that such credit, or application, is both erroneous in principle, and also that the sums which you are directed so to apply — viz., $910.74, $797.65, $1.708.39, either or both — are not properly so applicable. And we further dissent from the statement, contained in the Opinion, that these amounts, or any amount, were so applied in the District Court "without objection" from us or from any party.

(*b*) In that you are directed to credit to James E. Ward & Co. freight's contribution in general average. (Opinion, p. 36.)

As there can be no doubt that you are explicitly directed, in the Opinion, to make these credits, or applications, it does not seem to us competent, or proper, that we should file formal objections with you, to your report as Commissioner, because you have followed the directions of the Court in these respects.

We consider that our remedy lies in representing to the Court, upon the coming in of the report, these (as it seems to us) errors in the instructions to the Commissioner, and we shall do so at the earliest opportunity.

EDWARD S. DODGE,
Proctor for Libellants, Black et al.

JOHN LOWELL,
Proctor for Hans Andreasen.

C. T. & T. H. RUSSELL (by E.S.D.),
Proctors for Banque de Genes.

BOSTON, November 27, 1897.

THE ELIZA LINES AND PARTIES INTERESTED THEREIN TO J. D. BRYANT, *Special Commissioner*, DR.

To time and services relating to this matter, including:

1894 and 1895. Much time of the Commissioner on several days preceding notice of hearing in studying Opinion, documents and authorities referred to therein, in the endeavor to understand what were the issues of fact and law to be heard and determined by the Commissioner, say, in all, six days.

January 22. Notice to the parties of hearing on Saturday, January 26, 1895.

25. Conference with Mr. Cunningham about postponement of hearing, and in further examination of Opinion of Judge Putnam and authorities referred to therein, 3 hours.

26. Short session and adjournment by reason of Mr. Dabney's illness; 4 hours of Commissioner's time studying case.

February 1. Further time in examination of records and law, 2 hours.

2. First hearing, 10 to 12 (2 hours), and adjournment until further notice.

October 31. Second hearing, 3 to 5.15 (2¼ hours).
1896.

February 26. 2 hours Commissioner's time examining notes of former hearings and records of hearings in the District Court, and third hearing, 3 to 5 (2 hours).

March 4. Fourth hearing, 1 hour.

June 17. Entire afternoon and evening in careful examination of the evidence thus far in and authorities bearing thereon.

20, 24, 25, 26, 27, 29, 30. Much time on each of the days in the margin, with assistance of Mr. T. W. Gore, adjuster, in attempting to make adjustment in accordance with principles laid down in Opinion; 24th and 25th, 6 hours; 27th, 29th, 30th, 8 hours.

July 21, 22, 24, 25, 28, 29, 30, 31. Much time on each of these days, with the assistance of Mr. Gore (and 30 and 31st, entire days), concluding the first draft of adjustment and Report, and stenographer's time in copying same.

August 4. 5 hours with Mr. Gore, and otherwise on Report.

6, 7. 3 hours with Mr. Gore and on Report and revising same.

Sept. 24, 28. Conference and correspondence with parties in regard to date for next hearing.

30. Further hearing at request of Mr. Dabney, 3 hours.

October 7. Conference with Mr. Dabney and Mr. Dodge about facts.

12. Hearing, 10 to 2.30 (4½ hours).

November 3. 3 hours upon evidence adduced at recent hearings.

1897.

June 17. 4 hours on Commissioner's Report.

21. 4 " " "

22. 3 " " "

23. 3 " " "

July 26. 2 " " "

27. 1 " " "

28. 3 " " "

31. 5 " " "

August 2. 6 " " "

3. 8 " " "

4. 3 " " "

6. 6 " " "

7. 6 " " "

9. 6 " " "

Sept. 10. 1 hour revising figures of adjustment.

October 5. Notice to parties of hearing on draft Report.

7. Hearing on draft Report (1 hour) and 2 hours after hearing on modifications in consequence of suggestions at the hearing.

November 8. 2 hours in consideration of objections this day received to Commissioner's draft Report.

10. 3 hours on objections to Commissioner's draft Report and on Supplemental Report.

11. 4 hours
12. 2 "
15. 3 "
16. 4 "
17. 6 "
18. 8 "
19. 7 "

In consideration of objections and on Supplemental Report,—including several conferences with Mr. Gore.

20. 2 " revising Supplemental Report.

November 22. 2 hours on Supplemental Report.
26. 1½ " hearing on Supplemental Report.

For J. D. Bryant's time and services, as above . .	$850.00
For time and services of Theo. W. Gore, adjuster, at request of Mr. Bryant by authority of parties .	150.00
	$1,000.00

Received payment from Messrs. Gill & Lootz, May 9, 1899.

JOHN D. BRYANT.

Boston, February 26, 1896.

Present: Edward S. Dodge, Esq., *for* William W. Black;
John Lowell, Esq., *for* Hans Andreasen;
Lewis S. Dabney, Esq., *and* Frederic Cunningham, Esq.,
for Bradford Darrach.

DEPOSITION OF COOLIDGE S. ROBERTS.

Direct Examination by Edward S. Dodge, Esq.

Int. 1. What is your name?

Ans. Coolidge S. Roberts.

Int. 2. And what is your occupation?

Ans. Commercial. In the South American business; in trade with the Argentine Republic.

Int. 3. And whereabout in the Argentine Republic do you conduct your business?

Ans. In Buenos Ayres, the headquarters.

Int. 4. Does any portion of your business consist in the shipping of cargoes of hard pine lumber from the United States of America to the Argentine Republic, or in receiving such shipments there?

Ans. We do, yes.

Int. 5. Are you acquainted with the market prices of hard pine lumber in Buenos Ayres or Montevideo on or about the first of January, 1890?

Ans. Yes.

Int. 6. Please to state what the market price of hard pine lumber was at Buenos Ayres or Montevideo on January 1st, 1890, or as near thereto as you can.

Mr. Dabney: I object. I will state the objection.

The Commissioner: Do you want a ruling on it?

Mr. Dabney: Yes, I want a ruling upon it. My objection is, that it is wholly immaterial for the reason that the value of the cargo, under the decision of the Court, is its value in Boston. And the

value at Montevideo or Buenos Ayres or anywhere else has nothing to do with it.

Mr. LOWELL: If that is so, I do not understand the Opinion of the Court.

The COMMISSIONER: For the present, I will overrule the objection and let the evidence go in *de bene*.

Mr. LOWELL: The Opinion of the Court is: "In making up the judgment and decree rendered necessary by this Opinion, the first step will be to be determine the amounts the freight and cargo contribute to general average." This is page 35. "For this purpose the Commissioner will accept as general average charges the masts which were cut away to right the vessel. The value of the vessel on arrival at Boston will be taken at $2,250. In other respects, general average will be adjusted on the same principles as though the voyage had been subsequently completed, and according to the customs prevailing at the port of Boston."

The COMMISSIONER: I should like to ask the counsel at this stage if they understand this general average adjustment is to be made up as if the vessel had put in to Montevideo after the disaster, and as if that were the port at which the adjustment was to be made?

Mr. LOWELL: I so understand it.

Mr. DABNEY: I do not so understand it.

Mr. DODGE: I understand that is the view Judge PUTNAM takes of it in his Opinion.

Mr. DABNEY: I would like to know, then, why he takes the value of the vessel on arrival at Boston? If the value of the vessel at Boston is to be taken, it seems to me the value of the cargo at Boston should be taken. If the value of the cargo at Montevideo is to be taken, the value of the vessel at Montevideo should be taken.

The COMMISSIONER: Mr. Dabney saves his objection.

Int. 7. Now, Mr. Roberts, will you kindly answer the question?

Ans. The market value at that time was from $39 to $41, Argentine gold, on board the vessel.

Int. 8. Do I understand that to be the price per thousand superficial feet?

Ans. Per thousand superficial feet.

Int. 9. And was there at that time any discount or advance upon Argentine gold as compared with American gold?

Ans. The Argentine dollar, to put it into the American dollar, is reduced at 1.0364.

Int. 10. (By Mr. DABNEY.) I do not understand that, Mr. Roberts. Which is worth 1.0364?

Ans. The American dollar is worth 1.0364 Argentine dollars.

Int. 11. (By Mr. DODGE.) A discount of three and a half per cent.

Ans. About that; substantially three and a half per cent.

Int. 12. Are you able to state, Mr. Roberts, for how long a time subsequently to January 1st, 1890, the market prices continued to be as you have stated?

Ans. Subsequently?

Int. 13. Yes.

Ans. I couldn't say without looking that up from my correspondence.

Int. 14. Could you say whether it continued for two months subsequent to January 1st, 1890?

Ans. I could say that it continued all through January, but I have not the data with me beyond January.

Int. 15. The cargo concerning which we are inquiring here has been described as a cargo of re-sawed yellow pitch pine lumber. There is evidence that it was in ten or twelve different sizes, suitable for building purposes, but unsuited for the Boston market. Please to state whether or not the cargo described as I have now stated is the kind of cargo to which you referred in stating the price in Buenos Ayres.

Ans. Well, we invoice,— the lumber is invoiced "unsawn"—

Int. 16. Re-sawn?

Ans. Re-sawn yellow pine — pitch pine lumber. And the sizes, —we ship ten or a dozen or fifteen different sizes, more or less. But I do not know what sizes comprised this cargo. If I saw the assortment, I could tell.

Int. 17. For what purposes do you ship lumber to Buenos Ayres?

Mr. DABNEY: I object to that.

Int. 18. Or the kind of lumber to which you have referred in giving us the prices.

Mr. DABNEY: I would like to have my objection noted to that.

The WITNESS: Shall I answer?

Int. 19. Yes.

Ans. Will you please repeat the question?

[*The question was then read.*]

Int. 20. For what purposes is it to be used, I mean?

Ans. We send it there for sale, for the purpose of re-selling in the market there. Does that answer the question?

Int. 21. What I desired to know, if I could learn, was, for what purposes it was suited in particular, if any?

Ans. All purposes. It is a difficult question to answer categorically. Flooring for bridges, for railway wagons; many,—many different purposes.

Mr. DABNEY: Where do you find "re-sawed," Mr. Dodge?

Mr. DODGE: You will find it either in the charter party or bill of lading, page 37.

Mr. DABNEY: It is not in the bill of lading.

Mr. CUNNINGHAM: It is on page 35 of the charter party.

Int. 22. Are you able to state the average length of passage from Boston to Buenos Ayres or Montevideo in the months of October, November and December?

Ans. The ordinary passage would be, in those months, I think, fifty to sixty days.

Mr. LOWELL: On page 35 in the charter party is "re-sawn pitch-pine lumber." And in the bill of lading, page 37, is "yellow pitch-pine lumber."

Int. 23. Is there any difference, Mr. Roberts, between pitch-pine lumber and yellow pitch-pine lumber, commercially?

Ans. I never heard of any difference, no; it is one and the same.

Cross Examination by LEWIS S. DABNEY, Esq.

Cross-Int. 24. Mr. Roberts, are you a member of any firm?

Ans. I am.

Cross-Int. 25. What is the firm?

Ans. C. S. Roberts & Co.

Cross-Int. 26. And where is their place of business?

Ans. Buenos Ayres.

Cross-Int. 27. Who are your partners, please?

Ans. Frederic C. Cook, of Buenos Ayres.

Cross-Int. 28. In January, 1890, were you there in Buenos Ayres?

Ans. I was not.

Cross-Int. 29. When was the time, nearest to that, that you were there?

Ans. November, 1889.

Cross-Int. 30. Where were you in January, 1890?

Ans. I was in Boston.

Cross-Int. 31. How do you know what the market price was in Buenos Ayres at that time?

Ans. From letters written to N. W. Rice & Co., and I think to myself, from our house in Buenos Ayres.

Cross-Int. 32. That is, your only knowledge is what somebody wrote you?

Ans. From our house in Buenos Ayres, giving — shall I continue?

Cross-Int. 33. No.

Mr. DODGE: We would be very glad to have him continue, Mr. Dabney.

Mr. DABNEY: He has answered my question.

Cross-Int. 34. Now, how many such letters did you receive in January?

Ans. I have records here of two, but I know we received other letters. I couldn't say now how many we received, but several.

Cross-Int. 35. Have you lately examined two?

Ans. I got our stenographer.

Cross-Int. 36. You got what?

Ans. I got our stenographer to examine the letters.

Cross-Int. 37. And make copies of them?

Ans. Make copies of extracts.

Cross-Int. 38. And how many letters did he extract from? Do you know?

Ans. Two.

Cross-Int. 39. You have not looked at the letters?

Ans. I did not look at the letters, no, except—

Cross-Int. 40. And your knowledge is derived from extracts made from two letters, by your stenographer?

Ans. Yes, sir.

Cross-Int. 41. Now, will you please tell me another thing: Is all yellow re-sawn hard pine lumber of the same value in Buenos Ayres, or was it at that time?

Ans. No.

Cross-Int. 42. What different values were there, or what different classes were there that differed in value?

Ans. The lumber 1 by 3 size was a little more valuable.

Cross-Int. 43. What was that worth?

Ans. It may have been worth $1 or $2 more than the ordinary schedules.

Cross-Int. 44. With that exception, was all re-sawn yellow pine lumber of the same value?

Ans. Substantially.

Cross-Int. 45. No matter from where it came?

Ans. No matter from where it came.

Cross-Int. 46. Where did you get your lumber that you sent there or imported there?

Ans. We get lumber that we send there from all,—from Pensacola, Apalachicola, Satilla River,—those three ports.

Cross-Int. 47. Does that kind of lumber come there from any place but the United States?

Ans. It does not.

Cross-Int. 48. And does it all come from the Southern part of the United States?

Ans. It does.

Cross-Int. 49. Does the price that you have named include the payment of any duties?

Ans. No, it does not include the duties.

Cross-Int. 50. There are duties there, are there not?

Ans. There are duties there.

Cross-Int. 51. What is the duty on lumber?

Ans. At that time?

Cross-Int. 52. Yes.

Ans. I couldn't say from memory. I could give it later, but I couldn't say from memory.

Cross-Int. 53. Was it about thirty per cent?

Ans. It is an arbitrary rate, so much a thousand. I wouldn't like to state my impression. It will vary year by year.

Cross-Int. 54. You have named a price. You say $39 to $41 a thousand, subject to duty?

Ans. No, f.o.b., without duty.

Mr. LOWELL: "On board ship," he said.

The WITNESS: Yes, on board ship.

Cross-Int. 55. That is what I say, subject to duty.

Ans. Subject to duty.

Cross-Int. 56. The buyer pays the duties?

Ans. Oh, yes. I thought you said we pay the duty.

Cross-Int. 57. I say, subject to duty. You meant the buyer paid the duty?

Ans. The buyer assumed the duty.

Cross-Int. 58. Is that the way that lumber is sold there?

Ans. It was at that time.

Cross-Int. 59. How long after that did it continue to be so?

Ans. Well, I don't know from memory.

Cross-Int. 60. When, before that, did it begin to be so sold?

Ans. Oh, for a long time. When the lumber is on board, it was customary in those days to sell, duties for account of the buyers; and if the lumber was discharged in the yard, then the duty was included in the price.

Cross-Int. 61. The price you have given is for good sound lumber?

Ans. Yes.

Cross-Int. 62. What difference would it make if it had been in the water and been wet on the passage?

Ans If it had been slightly wet the discount would have been ten per cent.

Cross-Int. 63. Suppose it had been in a ship that was cast away

at sea, floating around for a week or two, with nobody on board of her, leaking, what then?

(*Objected to by Mr. Dodge as assuming that The Eliza Lines was leaking.*)

Ans. In that case the lumber would have had to have been discharged and sold on its merits; and it is a question I could not answer.

Cross-Int. 64. Suppose some of the lumber had been stained, what then?

Ans. Sap stained?

Cross-Int. 65. No, stained by salt water.

Ans. Then there would be an allowance of ten per cent.

Cross-Int. 66. (By the COMMISSIONER.) Additional to the other allowance?

Ans. I beg pardon?

Cross-Int. 67. Ten per cent discount, you say, if wet, and if stained, ten per cent. I ask if that ten per cent is in addition, making twenty per cent.

Ans. No. Of course I call stained and wet the same. But that, of course, is ordinary, without anything being very badly damaged.

Cross-Int. 68. (By Mr. DABNEY.) Are such sizes as 2 by 3, 3 by 4, 3 by 6 and 3 by 9 the sizes that you have in mind when you give the price at $39 to $41 a thousand?

Ans. Those are among the sizes.

Cross-Int. 69. What should you say, Mr. Roberts, would be a fair allowance from that price if the cargo had been exposed to the sea and weather for a long time, and, when it was put out, was thrown out in bulk, regardless, mixed up; suppose you then were selling it by the cargo, how much would you deduct from that price if the cargo was sold?

Ans. In Buenos Ayres?

Cross-Int. 70. Yes.

Ans. I would rather not answer that question, because there is no — I have no basis to go upon; there is no market custom governing that thing.

Cross-Int. 71. Well, we had to stand having our cargo sold in

that way here, and so I wanted to know what would be fair to us if it was sold that way there, too.

Ans. Cargo of that kind is discharged and sold on its merits.

Cross-Int. 72. Well, now, suppose it had been exposed to the sea and weather for a long time and was then thrown out in bulk, regardless, not sorted, and sold; how much would that affect that price that you have named? I would like to have your estimate of it.

Ans. I would rather not, unless — I would rather not answer that, because I do not feel competent — unless all wish me to answer it.

Cross-Int. 73. Well, I think I shall have to ask you to do so.

Mr. DODGE: Then I would like to object to the question as indefinite and as assuming facts not shown in the evidence.

[*Objection noted.*]

Ans. In all my experience I have not known lumber sold in that way.

Cross-Int. 74. I should like your judgment. You have been in the lumber business, and you say you have been in Buenos Ayres. Now, I should like to have your judgment of what difference it would make in the price if the cargo was sold in that way.

[*Question objected to as above.*]

Ans. Those things are so very capricious, it would depend on whether they formed a ring, or whether the stuff is badly damaged, and so many contingencies.

Cross-Int. 75. Well, it would make some difference, would it not?

Ans. Certainly it would make a difference. It might make a large difference and it might make a moderate difference. There is a vast range there.

Cross-Int. 76. What would you call a large difference; thirty per cent, thirty-three per cent?

[*Question objected to as above.*]

Ans. I should call thirty per cent a large.

Cross-Int. 77. What would you call a moderate difference?

Ans. I should call ten per cent a small.

Cross-Int. 78. Then those circumstances might make a difference of from ten to thirty per cent?

Ans. It might make that, but there is no basis to get this from.

Cross-Int. 79. What is the usual way for a person to go from here to Montevideo? If you want to go, how do you go?

Ans. I go to England.

Cross-Int. 80. And from there by steam?

Ans. From there by steam.

Cross-Int. 81. There is no steam from here, I suppose?

Ans. There are steamers from New York.

Cross-Int. 82. Steamers from New York?

Ans. Yes.

Cross-Int. 83. Well, you have given an average passage from Boston to Montevideo?

Ans. From Boston to Buenos Ayres,— the same thing.

Cross-Int. 84. In November, December and January?

Ans. Yes.

Cross-Int. 85. How do you know that?

Ans. From the records of vessels for a good many years.

Cross-Int. 86. Well, what kind of sailing vessels, Mr. Roberts, make it in that time?

Ans. The ordinary sailing vessel,— almost any of them. I don't mean the extra fast ones or the specially dull ones.

Cross-Int. 87. Isn't sixty days a very short passage?

Ans. No, it is not.

Cross-Int. 88. I thought the average passage was seventy-five or eighty days?

Ans. Oh, no.

Cross-Int. 89. It is not as much as that?

Ans. Oh, no. Seventy days is a long passage.

Cross-Int. 90. That would be an average passage for a Norwegian bark of between four and five hundred tons?

Ans. I should say so; yes. I should say sixty days would be an average passage for that vessel.

Redirect Examination by Mr. LOWELL.

Int. 91. Mr. Roberts, was it part of your business in 1890 to know the rates of lumber,— the value of lumber,— in Montevideo and Buenos Ayres?

Ans. In Buenos Ayres; yes, sir.

Int. 92. In Buenos Ayres?

Ans. Yes, sir.

Int. 93. The market of Montevideo is substantially the same, is it not?

Ans. It might or might not be. There are variations. There is quite a difference between the two markets.

Int. 94. If a person had the choice, at any given time, to go to whichever market he chose, he would be likely to choose the one that, at that time, was the highest, would he not?

[*Question objected to by Mr. Dabney.*]

Ans. Yes, sir; certainly.

Int. 95. You have been asked a somewhat indefinite question about what a cargo would bring if it was badly handled and thrown out in bulk, regardless. Would you think that was a proper way of selling a cargo?

Ans. Certainly not.

Int. 96. Would any merchant who cared for his own property sell it in that way?

[*Question objected to by Mr. Dabney.*]

Ans. He would not, on general principles.

Int. 97. I see by the evidence of one of Mr. Dabney's witnesses that portions of this cargo were entirely undamaged. I suppose your evidence as to a vessel floating around, etc., would not apply to that part of it. Portions of it were entirely undamaged. We cannot give you, perhaps, the exact amount—

The COMMISSIONER: Where is that, please?

Mr. LOWELL: That is page 108, Cross-Int 79.

[*Question continued:*] I will add this: Charles West, our witness, page 76, says, "I am a surveyor of lumber. I examined this cargo of the bark Eliza Lines. One third of it is wet and somewhat discolored. The rest of it is in perfect order. The actual damage to the cargo for ordinary use is small. This damage would not be increased by the cargo being reloaded and carried on to its destination." As to the two-thirds which was in perfect order, I suppose

your evidence as to the value would remain as given to us in the beginning?

Ans. The quotations I gave would refer to that portion of the cargo.

The COMMISSIONER: Of course it does not follow that it would be in perfect order when it reached Montevideo.

Mr. LOWELL: It would unless it was damaged on the way, which we do not expect. He says it would not injure even the injured part; he thinks it would not be any damage to the injured part; and as to the perfect part, I don't know why it should be damaged. He says, "The actual damage to the cargo, for ordinary use, is small. This damage would not be increased by the cargo being reloaded and carried on to its destination." And two-thirds of it was not damaged.

Int. 98. Do you happen to remember, Mr. Roberts, the price of lumber in November, when you left Buenos Ayres?

Mr. CUNNINGHAM: This last November?

Mr. LOWELL: November, 1889.

Ans. In a measure I do.

Int. 99. Well, state as nearly as you can.

Ans. Forty-one dollars is as near as I could get to it now.

The COMMISSIONER: Did your question relate to Montevideo or Buenos Ayres? He says there is a material difference.

Mr. LOWELL: We had the option to go to either.

The COMMISSIONER: But have I the option, under this order, to go to either? Does Judge PUTNAM tell the Commissioner he must find it at one port or the other? Perhaps you are right. "The next step for the Commissioner will be to state the amount of the net freight of the voyage to Montevideo and Buenos Ayres."

The WITNESS: My knowledge was entirely as to Buenos Ayres.

Int. 100. What were you about to state to Mr. Dabney when he said he had all the answer he cared for? Something about what the letters contained?

[*The testimony referred to was then read.*]

Int. 101. What did those letters give?

Mr. DABNEY: I object to it.

Int. 102. You can answer it.

The COMMISSIONER: I should think the best evidence would be the letters themselves.

Mr. LOWELL: I think an expert can answer, from whatever knowledge he has.

The COMMISSIONER: He says, letters to him or to his house. Your question now is, what is the contents of those letters?

Mr. DODGE: No,—what they gave.

Mr. LOWELL: He derives his opinion about prices, — it might be from prices current, it might be from letters which he did not have, letters to N. W. Rice & Co., which this gentleman would not have.

The WITNESS: Yes, it is all the same. N. W. Rice & Co. and our own are the same thing.

Int. 103. Now, if you will please to state, subject to objection, what those letters gave.

Ans. We had a letter written the 18th of January, stating that we had heard of sales at thirty-nine, gold, on board, and we were offering two cargoes of our own; and on the 24th of January they write that they expect to sell a cargo by the name of "The Chapman" for $40 gold, on board.

Recross Examination by Mr. DABNEY.

[*The following question was asked de bene esse.*]

Cross-Int. 104. Where did the $41 come in?

Ans. $41 came in,—a sale that we made by the "Amour." But I am not sure of the date.

Cross-Int. 105. Oh! Well, now, let me ask you another thing. You say you know the value in November, 1889?

[*The following question and answer in the redirect examination were then read:*]

"*Int.* 98. Do you happen to remember, Mr. Roberts, the price of lumber in November, 1889, when you left Buenos Ayres? *Ans.* In a measure I do."

What do you mean by that qualification, "In a measure"?

Ans. Well, as far as my memory goes, from the impressions,—I

was there selling lumber at that time; as far as my memory goes, it was about $41.

Cross-Int. 106. Now, I want to ask you this question: Suppose you sold in Buenos Ayres a cargo in the bulk, f. o. b., one-third of it wet and somewhat discolored, would not that affect the price of the whole?

Ans. Do you mean this specific cargo, or a cargo?

Cross-Int. 107. Take a cargo in January, 1890, on board of a bark, to be sold subject to duty, and one-third of it was known to be wet and discolored, and you sold it as a cargo in the way you have been speaking of, would not that fact that a third of it was wet and discolored affect the price of the whole?

Ans. It would not with us.

Cross-Int. 108. Do you mean it would sell for as good a price as undamaged?

Ans. We should sell the sound part, and then an allowance for the damaged part.

Cross-Int. 109. You would not sell it as a whole?

Ans. Yes, we would sell it as a whole on the basis of sound—basis of undamaged. Then we would have an allowance by the inspectors for the damaged.

Cross-Int. 110. And how large that allowance would be you could not tell now?

Ans. The inspectors would be the men to decide, when they came to it.

Cross-Int. 111. Please tell me another thing: When a ship goes to Montevideo for orders and to discharge there or at Buenos Ayres, I suppose she goes to Montevideo first?

Ans. She does.

Cross-Int. 112. And if she is then ordered on to Buenos Ayres, how much more does that cost her?

Ans. How much more it would cost the vessel?

Cross-Int. 113. Yes.

Ans. I couldn't say.

Cross-Int. 114. Is there some additional expense to it?

Ans. To the vessel?

Cross-Int. 115. Yes.

Ans. Yes, there are additional expenses to the vessel.

Cross-Int. 116. You do not know how much?

Ans. I could not say the amount. We do not charter for Montevideo for orders.

Cross-Int. 117. What would be about the amount of the inward charges at Buenos Ayres on a vessel of 462 tons, with a cargo of about 300,000 feet of lumber?

Ans. To the vessel?

Cross-Int. 118. Yes.

Ans. I could not answer that from memory; I am not familiar.

Redirect Examination by Mr. DODGE.

Int. 119. Are you able to state the distance between Montevideo and Buenos Ayres, Mr. Roberts?

Ans. It is about 120 miles, — about.

Int. 120. Was there, in January, 1890, a steam communication between the two places?

Ans. There was.

Int. 121. Was there telegraphic communication?

Ans. Also.

BOSTON, March 5, 1899.

DEPOSITION OF W. P. TRUESDELL.

Direct Examination by EDWARD S. DODGE, Esq.

Int. 1. What is your name?

Ans. W. P. Truesdell.

Int. 2. And what is your occupation?

Ans. Stenographer.

Int. 3. For what firm?

Ans. N. W. Rice & Co.

Int. 4. How long have you been stenographer for them?

Ans. Two years.

Int. 5. Are you in the employ, as well, of the firm of C. S. Roberts & Co.?

Ans. Yes.

Int. 6. Have you the charge of, or have you access to, the correspondence of those firms with the members of the firm at Buenos Ayres, Argentine Republic?

Ans. I have.

Int. 7. Are you acquainted with the handwriting of the members of the firm in the city of Buenos Ayres?

Ans. Yes.

Int. 8. Will you please to produce any correspondence of that firm, within your possession and control, relating to the price of hard pine lumber at Buenos Ayres in the last part of 1889 or the first part of 1890?

Ans. Shall I take this letter book here?

Int. 9. Yes, just take the letter book.

Int. 10. (By Mr. DABNEY.) Did you say you were employed by C. S. Roberts & Co.?

Ans. Partly. It is for the joint account.

Int. 11. (By Mr. DODGE.) I will ask you if you have in your possession letters of the kind I have described, relating to the price of lumber in Buenos Ayres on or about the first day of January, 1890?

Ans. Yes, I have one January 18, and 24, which refer to that.

Int. 12. Please to state who was the writer of those letters and to whom they were written.

Ans. Mr. F. C. Cook, to N. W. Rice & Co.

Int. 13. And who is Mr. F. C. Cook, if you please?

Ans. He is the partner of Mr. C. S. Roberts in C. S. Roberts & Co.

Int. 14. Have you now before you the originals of those letters?

Ans. I have.

Int. 15. Will you please to produce, for the magistrate to copy, those letters or all such parts of those letters as relate to the price of hard pine lumber at Buenos Ayres in 1890?

[*Mr. Dabney objects to the question and to the letters as incompetent and immaterial.*

[*It is hereby agreed between counsel that the witness may dictate to*

the stenographer all such portions of the letters referred to as relate to the price of hard pine lumber at the time inquired of, and no objection is to be taken because the whole letter is not introduced. And such extracts may stand in lieu of the production of the original letters.]

The WITNESS: Dated "Buenos Ayres, January 18. To N. W. Rice & Co. Heading: Pitch Pine. We hear has been sold at $39 gold on board. We are offering the 'Chapman's' assortment to the Port Works and are also trying to sell the 'Chapin' to the Rosario Railway. Signed, C. S. Roberts & Co., by F. C. Cook." That is, that is his signature. Letter dated "Buenos Ayres, January 24, 1890. Heading: Pitch Pine. We think we will be able to sell the 'Chapman's' assortment to the Port Works. Mr. Walker will answer today. We expect to get $40 gold on board. We are also offering the 'Chapin,' but as yet have no offers. 'Chapman's' cargo sold to Port Works at $40 gold per thousand feet on board. Duties for account of buyers. Bolito not yet signed."

Int. 16. That means bill of lading?

Ans. Yes, bill of sale. Signed, "C. S. Roberts & Co."

Int. 17. Is there any other stenographer of the firm of N. W. Rice & Co., or C. S. Roberts, than yourself?

Ans. No, sir;—not that I know of, rather.

Int. 18. Did you, within a week or two past, look up these letters for Mr. Roberts of that firm?

Ans. Yes.

Int. 19. And these letters to which you have testified here are the letters that you looked up for him at that time?

Ans. They are.

Int. 20. Have you in your control or possession any accounts of sales made by the firm of N. W. Rice & Co., or of C. S. Roberts & Co., at Buenos Ayres about the first of January, 1890?

Ans. I have.

Int. 21. Will you kindly produce them?

Ans. Yes. I have the account sales of the "Amor" and "Chapman."

[*Mr. Dabney objects to the accounts of sales.*]

Int. 22. Have you prepared copies of the accounts of sales of the cargoes "Ex. Amor" and "Ex. Chapman"?

Ans. I have.

Int. 23. And will you please to produce them to be annexed to your deposition?

[*Objected to.*]

Ans. I have done so.

Int. 24. Will you please to state whether or not the feet specified in those several accounts are superficial feet or what kind of feet they indicate?

[*Objected to.*]

Ans. They are superficial feet.

Int. 25. And are you familiar with the method in which the accounts of sales of those two firms are made up?

Ans. To a certain extent.

Int. 26. Will you please to state from each of those accounts at what price it appears that their several cargoes were sold, per thousand superficial feet?

[*Objected to.*]

Ans. The cargo per "Chapman" at $40 per thousand feet. The cargo per "Amor," $41 per thousand feet.

Int. 27. Does it appear from those accounts whether the sales were made free on board or with duties paid?

[*Objected to.*]

Ans. They were made free on board.

[*Answer objected to as not responsive.*]

Int. 28. Does it appear in those accounts whether the sales were made free on board?

Ans. It does appear so.

Int. 29. And are the prices named in those accounts in American gold or Argentine gold?

Ans. They are named in Argentine gold.

Int. 30. And are you able to state what, at the times embraced in those several accounts, the discount upon Argentine gold was?

[*Objected to.*]

Ans. Argentine gold was reduced at the rate of 103.64 cents to the dollar.

Int. 31. That is to say, the American dollar was worth —

Ans. 103.64 of Argentine.

Cross Examination by LEWIS S. DABNEY, Esq.

[*The entire cross-examination is de bene esse.*]

Cross-Int. 32. Have you any knowledge of the value of the Argentine dollar except what you gather from these accounts?

Ans. I have.

Cross-Int. 33. At that time?

Ans. I was not here at that time.

Cross-Int. 34. That was in 1890. My question is, have you any knowledge of the value, at that time, of the Argentine dollar, except what you gather from those accounts?

Ans. No, I have not.

Cross-Int. 35. Where in the account does it show whether the cargo is sold subject to duty, or duty paid?

Ans. In the account showing the charges.

Cross-Int. 36. Do you mean, in the absence from the charges of any charge for duties?

Ans. Yes.

Cross-Int. 37. Anything else?

Ans. No.

Cross-Int. 38. Tell me, please, if you know, what firm this book is kept for.

Ans. N. W. Rice & Co., and in joint account with C. S. Roberts & Co.

Cross-Int. 39. And in 1890 where was this book kept?

Ans. In Boston, I presume.

Cross-Int. 40. Do you mean that the book in which both the accounts of which you produce copies appear and are kept is a book kept at that time in Boston?

Ans. I do.

Cross-Int. 41. In whose handwriting is the account "Ex. Amor," dated March 15, 1890?

Ans. E. L. Pickard, Jr.'s.

Cross-Int. 42. And who is E. L. Pickard, Jr.?

Ans. The son of Mr. E. L. Pickard, partner of N. W. Rice in the firm of N. W. Rice & Co.

Cross-Int. 43. In whose handwriting is the account of sales "Ex. Chapman," dated April 19, 1890.

Ans. In E. L. Pickard, Jr.'s.

Cross-Int. 44. Then both those original accounts in the book, of which you have produced copies, were written in Boston?

Ans. They were.

[*It is hereby agreed that the accounts of sales, "Ex. Amor" and "Ex Chapman," when verified as copied by the magistrate and so certified, may have the same force and effect as the originals would have subject to the objections already taken.*

[*Mr. Dabney inspects the book of letters, and dictates the following extracts de bene esse.*]

Mr. DABNEY: Another extract from the letter of January 18, 1890: "There seems to be a little better feeling all round. The crops promise to be fairly good, but it must be borne in mind that the stock of lumber is quite large, especially pine and spruce, and the large quantity of pitch pine on the way is more than ample for the present requirements."

Another one: "Girard is down; says Rosario is full of all kinds of lumber. He adds, 'more than full'."

From the letter of January 24: "Imports continue dull, and business is difficult. It is next to impossible to get the lumber people to talk prices. The market is overstocked with pine, and there is an abundance of spruce. Pitch pine is in better request, but the quantity coming forward is more than will be required, and it looks as though prices will weaken off considerably." "Rosario is full of all kinds of lumber. It looks as though they had sufficient for the next two years."

Cross-Int. 45. Will you please point out to me, Mr. Truesdell, where you find in either of those letters a statement of any sale of the "Chapman's" cargo?

Ans. In the letter of January 24, 1890, in pencil at the top of the letter.

Cross-Int. 46. What is that dated?

Ans. January. I dated it at the beginning.

Cross-Int. 47. What is the pencil at the top of the letter dated?

Ans. January 24, 1890. "Received March 3," at this end.

Cross-Int. 48. Oh, "received March 3, 1890." In whose handwriting is the pencil?

Ans. Mr. F. C. Cook's.

Cross-Int. 49. Well, am I to understand that that letter arrived with that pencil memorandum on it?

Ans. You are.

Cross-Int. 50. How long have you been employed by C. S. Roberts & Co.?

Ans. Two years.

Cross-Int. 51. You say you are employed jointly by C. S. Roberts & Co. and N. W. Rice & Co.?

Ans. Yes, sir.

Cross-Int. 52. Who represents C. S. Roberts & Co. here where you do your work?

Ans. C. S. Roberts.

Redirect Examination by Mr. DODGE.

Int. 53. Do you know where Mr. E. L. Pickard, Jr., is now?

Ans. He resides at Auburndale, Mass.

Int. 54. Does he come here to the office, or is he in any way connected with the office now?

Ans. He is not.

Int. 55. Do you know, at the time of his entering those accounts of sales to which you have testified, whether he had any official connection with the firm or with the accounts of the firm?

Ans. I couldn't say positively.

Int. 56. What is that book from which you testify,—or rather that book which contains the accounts of sales to which you have testified?

Ans. The export book.

Int. 57. Whether or not it is kept in the regular course of the business of N. W. Rice & Co., in joint account with C. S. Roberts & Co.?

[*Objected to.*]

Ans. It is.

Signature, certificates, and filing are waived.

L. S. DABNEY,
for Cargo.

I, John C. Miller, hereby certifiy that as Notary Public I took stenographically the foregoing deposition of W. P. Truesdell, having first administered to him the customary oath, in the presence of Edward S. Dodge, Lewis S. Dabney and Frederic Cunningham, Esqrs., proctors for the several parties; that after the taking of said deposition I reduced my stenographic notes into the form in which they here appear; and I hereby certify that the questions put to the said witness and the answers thereto are herein correctly reported. And I hereby further certify that the copies of accounts of sales, hereto annexed, of the barks "Chapman" and "Amor," were by me compared with the originals and are correct copies of said originals.

JOHN C. MILLER,
Notary Public.

[SEAL]

ACCOUNT SALES OF P. P. ES "AMOR".

Sold at 6 mos.

				Arg. Gold.	U.S. Gold.
By Sale, P. P. On deck, . .	49,352 feet.				
less allow. splits, . . .	35 "				
	49,317 ft. at $41, less 10%,			1,819.80	
			$18,103.80		
Under deck 441,556′ at $41					
Allowances: 10% of 14,534 sappy, . . .	1,453.40				
10% 2,084 damgd, . . .	208.40				
	1,661.80′ at 41	68.14	18,035.66		
	Due Aug. 31/90, .			$19,855.46	
By Capt's 1/2 of short delivery 3,479 at 45, 156.56 1/2				78.28	
				$19,933.74	
$19,194.12 Arg. Gold red. at 103.64				19,194.12	$18,519.99
				739.62	

CHARGES.

	Paper.	Arg. Gd.	U.S. Gd.		
			6,201.24		
Feb. 19, To Invoice cost due Sept. 5/89 .			9,653.03		
Freight	587.47				
Boca Charges	241.65				
Measg. & Labor, . . .		99.67			
Brokerage 1/2 %, . . .	100.00				
Stamps & Petties, . . .	32.52	3.50	796.35		
Interest at 7%, . . .		199.34			
Guarantee at 1% . . .					
	961.64	437.11		739.62	16,650.62
Profit transferred Imp/C. . .					$1,869.37

E & O. E.

Buenos Aires, March 15, 1890.

A true copy. Attest: JOHN C. MILLER, *Notary Public.*

Account Sales of P. Pine Ex "Chapman",

					Arg. Gold.	U.S. Gold.
Apr. 1, 1890	By sale of 312,350′			312,350 ft.		
	Less allow. splits		110			
	Less allow 10% of 1800 sappy,		180			
				290		
	Under deck,			312,060 at $40	$12,482.40	
	On "			23,515 " $40	846.54	
	Less 10%				$13,328.94	
Total 11,842 pcs. 335,575 ft. $12,985.60 reduced at 103.64					$12,985.60	$12,529.53
					343.34	

Dr.

	Paper.	Arg. Gd.	U.S. Gd.		
To Inv. cost due Sept. 1/89			4172.16		
Freight			6959.14		
Gratuity to Capt.		25.00			
Measg. & lab.	$134.34				
Brokerage 1/2%		66.65			
Inward towage	97.30				
Stamps & Petties,	80.00				
311.64 reduced at 280	$311.64	111.30			
To interest at 7%		7.10	564.01		
guarantee at 1%		133.29		343.34	11,695.31
			Profit transferred to Import A/c.		$834.22

E. & O. E.

Buenos Aires, April 19, 1890.

E. L. P. Jr.

A true copy. Attest: John C. Miller, *Notary Public.*

[*Part of the testimony of Gjert Lootz, February 26, 1896, before John D. Bryant, Commissioner.*]

Mr. DODGE: I would ask the Commissioner to find at least, if he finds no other evidence, that it appears by the record that, say deposition of Nichol, page 39, page 42, answer of claimants, page 20, that the Atlantic Insurance Company paid to James E. Ward & Co. upon abandonment $4,560 for this cargo, and that the freight upon the cargo was to be $20 per thousand in gold.

Mr. DABNEY: Evidence of the loss that was paid by the insurer upon abandonment is not to be considered, and is not competent on the question of the value of the cargo.

Mr. DODGE: In reply to that I would say, however that might be in an ordinary case, that James E. Ward & Co. are estopped to take that position in this case, inasmuch as upon the examination of William H. T. Hughes, page 99 of the record, one of the firm, he was explicitly asked these questions by us as to value and evaded the questions, saying that he could not tell without examination of his books.

EXAMINATION OF GJERT LOOTZ.

Direct Examination by EDWARD S. DODGE, Esq.

Int. 1. Mr. Lootz, did you see this cargo of the Eliza Lines unloaded here in Boston?

Ans. I did off and on; I was over there three or four times.

Int. 2. What stevedore attended to it?

Ans. John Quinn.

Int. 3. In what shape was it put out on the wharf?

Ans. Well, it was not assorted; it was piled up in different sizes all together, but it was very carefully handled.

Int. 4. Was it assorted in the vessel?

Ans. No, sir; it never is.

Int. 5. Is it true that the stock was badly handled in being discharged and was badly damaged?

Ans. No, that is far from the truth. It was piled up, as I say, and was not assorted, but it was very carefully handled. There was some that had been wet, that was on deck; but I did not see a plank that came from the hold that had been wet.

Cross Examination by LEWIS S. DABNEY, Esq.

Cross-Int. 6. How many times were you over there, Mr. Lootz?

Ans. Well, it is a long time, but I should say at a guess that I was there four times.

Cross-Int. 7. The outward charter to Lisbon was how much?

Ans. She was chartered to Lisbon, Portugal, or Cadiz, Spain. The cargo was discharged at Lisbon for $2,904. The money was paid there.

Cross-Int. 8. She arrived in Lisbon, you say, February 8?

Ans. I have a letter from the Consul there, saying she arrived on the 7th.

[*Changed in the memorandum to 7th.*]

Cross-Int. 9. Where did you get the information on which you made the charges at Lisbon $300?

Ans. At Lisbon? I had to take them from a book called port charges, which gives every port in the United States, and I took a vessel that was registered 300 tons, I think. That is the only way to get that; $300 is merely an estimate.

Cross-Int. 10. How about the charges at Boston?

Ans. Those are actual, taken from our books. Here is a copy taken from our books.

Cross-Int. 11. Now, these wages and provisions, how did you get at that; is it based on so much a day?

Ans. That is taken from the ship's articles at so much a month.

Cross-Int. 12. Now, you have insurance here at $225. What is that on?

Ans. That is on the vessel alone. The value of the vessel when she went out of here was $9,000; the value when she came in was $2,250. We put $7,000 worth of repairs on her; that insurance is reckoned on $9,000.

Cross-Int. 13. Now, in this memorandum is this item: "Reloading 290,000 feet of lumber at Boston $0.50 (½ cargo)." I don't know what that means.

Ans. Well, that means this, Mr. Dabney. That, in case you had not been kind enough to take the cargo away from us, we would not have unloaded but half of the cargo. There was nothing to be done to her keel or hold, and we would only have to unload half of the cargo and reload it again.

Cross-Int. 14. Could you get it done for fifty cents per thousand?

Ans. Yes, that is the regular price. Could get it done for forty now.

Cross-Int. 15. Where did you get this $277.80 inward charges from Montevideo?

Ans. There was only one way to get that. I went down to J. S. Emery & Co., who own more vessels in that trade than any other firm, and looked over their books.

Cross-Int. 16. The wages and provisions for the outward voyage are not down here. Can you tell me how much they would be per day out to Buenos Ayres?

[*It was agreed that the wages and provisions for both voyages should be put at $9 per day.*]

Redirect Examination by Mr. DODGE.

Int. 17. Have you ever made that voyage to Buenos Ayres yourself, Mr. Lootz?

Ans. Not directly to Buenos Ayres. I have been by there a good many times.

Int. 18. Do you know of your own knowledge how long it takes to go from Boston?

Ans. I call seventy-three days a very long time; fifty-five days would be a good average, and there have been captains go in forty-five days.

Recross Examination by Mr. DABNEY.

Cross-Int. 19. For what kind of a vessel would fifty-five days be a good average?

Ans. Any old hulk at all that could carry sail enough could do it in that time if she had a spunky captain who would carry all the sail he could and would not go to sleep.

RE THE ELIZA LINES, HER CARGO AND FREIGHT.

The foregoing typewritten report on four pages of paper [pp. 313, 314, 315] is identified by me as the report furnished by the stenographer of what purports to be to that extent the testimony of Gjert Lootz before me as Commissioner at a hearing in the above-entitled cause on the twenty-sixth day of February A.D. 1896. I believe the same to be a correct report of the testimony it purports to transcribe.

JOHN D. BRYANT, *Commissioner.*

Boston, September 30, 1896.

Present: Hon. John Lowell, *Counsel for* Hans Andreasen, *Master;*
Edward S. Dodge, Esq., *Counsel for* William W. Black *et al., Libellants, and for* Banque de Genes;
L. S. Dabney *and* F. Cunningham, Esqs., *Counsel for Atlantic Mutual Insurance Company.*

EXAMINATION OF BRADFORD DARRACH.

Direct Examination by Lewis S. Dabney, Esq.

Int. 1. Mr. Darrach, your name is Bradford Darrach?

Ans. Bradford Darrach.

Int. 2. You live where?

Ans. Elizabeth, New Jersey. My residence, do you mean?

Int. 3. Yes.

Ans. Yes.

Int. 4. What is your occupation?

Ans. Appraiser.

Int. 5. Appraiser of what?

Ans. Of damage to goods.

Int. 6. How long has that been your occupation?

Ans. From ten to fifteen years.

Int. 7. From ten to fifteen years?

Ans. Possibly more than that. I don't remember the exact date.

Int. 8. Are you connected with the Atlantic Mutual Insurance Company?

Ans. I am.

Int. 9. How long have you been connected with them?

Ans. Thirty years.

Int. 10. During the time that your business has been appraiser of damaged goods, have you had any experience with damaged cargoes of pitch pine lumber?

Ans. Considerable.

Int. 11. To what extent?

Ans. Well, I suppose I have settled a dozen losses on it in a little over a year.

Int. 12. Partial losses?

Ans. Partial losses.

Int. 13. Is that lumber that is cut in this country?

Ans. Cut in this country; yes, sir.

Int. 14. Where did it come from?

Ans. From North Carolina, Georgia and Florida principally.

Int. 15. Is that lumber that is called pitch pine lumber the same kind as yellow pine lumber?

Ans. It is of the same character.

Int. 16. Re-sawn pitch pine lumber?

Ans. Yes, re-sawn, both dressed and kiln dried and rough.

Int. 17. Did you in September, 1889, or at any time about that time, see the cargo of pitch pine lumber of the bark Eliza Lines, of Boston?

Ans. I did; yes, sir.

Int. 18. Have you any memorandum in regard to it?

Ans. I have memoranda that I made at the time.

Int. 19. Well, can you state when the date was?

Ans. I can state it was about the 20th or 21st, 22d or 23d of September, 1889. I don't know the exact day when I first saw the cargo, but it was in that neighborhood.

Int. 20. I want to know in what year and month you saw it.

Ans. September, 1889.

Int. 21. Did you see the cargo more than once?

Ans. I saw it several times while it was on board the ship.

Int. 22. Were you here on behalf of the Atlantic Insurance Company at that time?

Ans. Yes, sir.

Int. 23. Will you state, please, what condition the cargo was in?

Ans. The cargo was — the deck load of the vessel was more or less chafed; it hadn't been broken loose, it was stained with water, and had been exposed to the seas and air, and the cargo in the hold in sight had every evidence of having been thoroughly wetted with

water. There were two hatches off, and the vessel had every appearance of having a large quantity of water in her hold. She was down by her head, and the lumber was what I should call in a damaged condition.

Int. 24. What percentage of its value do you think the damage amounted to?

Ans. At that time?

Int. 25. Yes.

Ans. Well, having the lumber in a market suitable for it, I should have figured the damage at anywhere from twenty-five to forty per cent.

Int. 26. Having what?

Ans. Having it in a market that was suitable for the lumber.

Int. 27. Can you tell us what percentage the damage to the cargo would have injured its value in Montevideo or Buenos Ayres?

Mr. DODGE: I should like to note an objection to that, on the ground that it does not appear that he has had experience with regard to the value of this kind of cargo at Montevideo or Buenos Ayres.

Int. 28. Have you had any experience with regard to cargoes damaged by water, pitch pine lumber, like the cargo of the Eliza Lines, in Montevideo or Buenos Ayres?

Ans. Yes, sir.

Int. 29. What experience?

Ans. An experience of thirty years, both in seeing and adjusting claims presented to the Atlantic Mutual Insurance Company.

Int. 30. How many cargoes have you had experience in, roughly?

Ans. Well, it would be hard to say. Some years we would have, possibly, five or six claims, and other years we would have twenty or thirty.

Int. 31. Well, now, state, if you please, taking the market at Buenos Ayres and Montevideo, what amount, or per cent. the damage to the cargo of the Eliza Lines would have injured its value there.

Ans. From my experience, I made an estimate at the time that the cargo would lose not less than thirty per cent,—probably more.

Cross Examination by EDWARD S. DODGE, Esq.

Cross-Int. 32. When you say, Mr. Darrach, that the cargoes with which you have had experience have been of the same character as pitch pine lumber, do you mean that they are identical or that they are similar?

Ans. Well, I have had all kinds; I have had scantling, and timber, which, if my recollection is correct, was the the cargo of the Eliza Lines; I have had furring, sheathing boards, rough lumber, not dressed, all of yellow pine. There are various qualities of yellow pine, — the Georgia, North Carolina and —

Cross-Int. 33. Is there a difference, technically or commercially, between yellow pine and pitch pine lumber?

Ans. I think there is a difference in the trade, though I am not competent to say what the difference is.

Cross-Int. 34. I understand you to say that your experience has been with yellow pine?

Ans. All kinds of lumber.

Cross-Int. 35. Well, to what extent has it been with pitch pine?

Ans. Do you mean how many cargoes have I —

Cross-Int. 36. Yes, about what proportion of the cargoes that you have surveyed have been of pitch pine, and what of yellow pine lumber?

Ans. I couldn't say what proportion.

Cross-Int. 37. Well, which have you had to do with the more, pitch pine or yellow pine lumber?

Ans. I couldn't say without making some references to it.

Cross-Int. 38. Did I understand you to say that you were here on behalf of the Atlantic Insurance Company in regard to this cargo?

Ans. Yes, sir.

Cross-Int. 39. You made a claim for that cargo, did you not?

Ans. My recollection is that I did.

Cross-Int. 40. Will you please to look at the copy of this claim, on pages 8 and 9 of the record, and see whether you recognize that claim on behalf of James E. Ward & Co.?

Ans. Yes, sir.

Cross-Int. 41. So you claimed that on behalf of James E. Ward & Co., did you?

Ans. Yes, sir.

Cross-Int. 42. Did you at any time see the cargo of the Eliza Lines after it had been wholly discharged from the vessel?

Ans. I don't remember that I did.

Cross-Int. 43. How much of it was discharged from the vessel at the last time that you saw it?

Ans. I couldn't say.

Cross-Int. 44. Was the deck load off when you last saw it?

Ans. That I couldn't say.

Cross-Int. 45. You are unable to say, then, that you ever saw anything relating to the condition of that cargo in the hold of that vessel?

Ans. I wouldn't say. My recollection is not clear on that point.

Cross-Int. 46. Well, where was the cargo when you saw it, Mr. Darrach?

Ans. My recollection of the first time I saw that cargo is that it was on board the vessel, I think, at Lewis' Wharf. I am not sure as to the wharf.

Cross-Int. 47. And where was the cargo when you last saw it, or any portion of it?

Ans. That I couldn't say.

Cross-Int. 48. Are you prepared to say that you ever saw any portion of the cargo outside of the vessel?

Ans. No, I am not prepared to swear to that.

Cross-Int. 49. And I presume, Mr. Darrach, that you would not undertake to claim that a man who went on board a vessel and simply saw the deck load would be in any condition to judge what the condition of the cargo was all through in the hold, would you?

Ans. Yes, I should.

Mr. DARNEY: He said that the hatches were off, and that he saw the cargo in the hold.

Cross-Int. 50. How was the cargo stowed in the hold?

Ans. In what respect do you mean?

Cross-Int. 51. Was it stowed solidly, or were there spaces down between into which a person could get down in the hold?

Ans. It was stowed, as I recollect, in the same way that cargoes of lumber are usually stowed.

Cross-Int. 52. Did you ever go into the hold of the vessel?

Ans. I did not.

Cross-Int. 53. So that the means that you had of judging of the extent of the injury was from what superficial examination you could make of the deck load?

Ans. And from my experience with cargoes of that character, that had been in such condition that I knew that had been.

Cross-Int. 54. But as to making any examination of the condition of that cargo, you saw nothing that you would be willing to swear to except what you saw with regard to the deck load?

Mr. DABNEY: That is not what he said. He said that the hatches were off.

Cross-Int. 55. Were the hatches off?

Ans. There were two hatches off.

Cross-Int. 56. Which two?

Ans. I think it was the forward hatch or the after hatch.

Cross-Int. 57. You are not certain about that?

Ans. I can tell by referring to my memorandum.

Cross-Int. 58. Have you it here?

Ans. Yes, sir.

Cross-Int. 59. I would like to have you refer to it.

Ans. Yes; the fore hatch and the lazaret hatch.

Cross-Int. 60. Do you remember whether or not there was a house over the after hatch that you call the lazaret hatch?

Ans. I don't remember; no.

Cross-Int. 61. There might have been, so far as your recollection goes?

Ans. There might have been.

Cross-Int. 62. Was the cargo underneath the two hatches which you saw off loaded —

Ans. I don't remember that there was any cargo in sight under the lazaret hatch.

Cross-Int. 63. You don't remember that there was any in sight there?

Ans. The fore hatch.

Cross-Int. 64. So that all the observation you had through the hatches was through the fore hatch; is that the fact?

Ans. It probably was.

Cross-Int. 65. Was the cargo underneath the fore hatch loaded right up to the under side of the deck timbers?

Ans. I couldn't say that.

Cross-Int. 66. Was the condition of the cargo, so far as you could observe it, immediately under the fore hatch?

Ans. I have no special recollection of the actual condition.

Cross-Int. 67. Now, am I right in this, Mr. Darrach, that all the knowledge that you had, by actual observation, of the condition of that cargo, was what you could get from a superficial examination of the deck load, and such observations as you could make through the fore hatch?

Ans. My examination of the deck load was not a superficial examination. It was a careful examination of the condition, and I was able to judge of the condition of the cargo from what I saw and what I knew must be the case from my past experience.

Cross-Int. 68. I am asking you to answer a question quite different from that. What I mean by superficial examination is this: Did you at any time have that cargo moved from one place to another on the deck, or overhauled, or any of it displaced?

Ans. A great deal of it was displaced.

Cross-Int. 69. But did you have any of it on deck overhauled?

Ans. I didn't move it at all.

Cross-Int. 70. So that after you came to see it it was not displaced at all, was it?

Ans. It was not moved after I was there.

Cross-Int. 71. No. During your examination it lay all in one position; isn't that the fact?

Ans. That is exactly so.

Cross-Int. 72. Now, what I mean by a superficial examination is such examination as you could make of the deck load, without any of

it being moved. Now, I ask you again, do you testify here in regard to the probable damage to that cargo from such superficial examination — superficial in the sense in which I have explained the word — as you were able to make of the deck load, and through the fore hatch?

Mr. DABNEY: That question has been answered, and I object to a repetition of it.

The COMMISSIONER: I think it may be answered.

Mr. DODGE: Please answer the question.

[*The question was read.*]

Ans. I testified to my judgment of the condition of the cargo from what I saw, and my past experience with similar cargoes on vessels in a similar condition.

Cross-Int. 73. Again you have not answered the question. I am asking you as to what you actually saw — I care nothing at all now about your experience — I am simply asking you a definite question: Whether you made any further examination of the cargo excepting a superficial examination of the deck load, and what you could see through the fore hatch?

Ans. I think I have answered that, Mr. Dodge, and I think I have told you what I did.

Mr. DABNEY: The witness has told just what he did.

The COMMISSIONER: The understanding of the Commissioner is that the witness said that he made no examination except that he saw the deck load, and what he could see through the fore hatch.

Mr. DODGE: That is the inference to be drawn from a series of questions, but I wanted him to admit it concretely.

The COMMISSIONER: However, I do not see any reason why that question may not be put and answered.

Mr. DODGE: If that is the Commissioner's understanding of it, I do not care to put it. I think that we all understand it now.

Cross-Int. 74. Have you ever been a dealer in lumber of any kind, Mr. Darrach?

Ans. No, sir.

Cross-Int. 75. Have you ever been in Buenos Ayres or Montevideo?

Ans. No, sir.

Cross-Int. 76. Have you any knowledge of the market in Buenos Ayres and Montevideo except such as you have gained by hearsay — that is to say, such as other people have reported to you, or that you have seen reported, or such information as was sent to you by mail?

Ans. I know only from what information I have received from merchants who do business there, and receiving documents, and by claims received for losses.

Cross-Int. 77. Claims made on the Atlantic Mutual Insurance Company for losses?

Ans. Yes, sir.

Cross-Int. 78. I understand you to say that you estimated this cargo would lose thirty per cent of its value in transportation to Buenos Ayres or Montevideo?

Ans. I think I said not less than thirty per cent.

Cross-Int. 79. In what way would that loss occur, in your judgment?

Ans. In the difference between the sound market value and what it might produce by sale, or the damage as fixed by appraisement.

Cross-Int. 80. You haven't reference, then, to any increased damage that you thought might occur by reason of transporting that cargo to Buenos Ayres or Montevideo?

Ans. Its condition at that time.

Cross-Int. 81. You mean, then, that you thought that, in its condition here in Boston, that same condition in Buenos Ayres or Montevideo would decrease its value thirty per cent?

Ans. Yes, sir.

Cross-Int. 82. And that you judge by comparison with other cargoes?

Ans. I judge from my knowledge of the condition of other cargoes and the circumstances of this case, and what I saw of the cargo as it was.

Cross-Int. 83. And as you have never been in Buenos Ayres or Montevideo, I suppose you never saw any other damaged cargo in

Buenos Ayres or Montevideo in the condition in which this cargo arrived in Boston, did you?

Ans. I never saw any cargo in Buenos Ayres or Montevideo.

Cross-Int. 84. Adjusting losses on cargoes of lumber is only a portion of your business, I presume, is it not?

Ans. Yes, sir.

Cross-Int. 85. And what other cargoes do you adjust?

Ans. Anything that the Atlantic Insurance Company may insure.

Cross-Int. 86. So that adjusting losses upon cargoes of lumber constitutes but a small portion of your business?

Ans. A portion of it only.

Cross-Int. 87. I will ask you to look on page 13 of the record, at what is there entitled "Motion for an Interlocutory Sale," and state whether you recollect signing that motion, or having that motion made in your behalf.

[*Objected to.*]

The COMMISSIONER: I think the witness testified that he appeared and acted here for the Atlantic Insurance Company, and represented them. It seems to me it is competent, if it can be shown either by reference to the record or otherwise, that the witness acted in a different capacity, or for somebody else,— if that can be shown, I do not see why it is not competent to show it.

Mr. LOWELL: If Mr. Dabney does not object, I should like to put one or two questions.

Mr. DODGE: Shall we have that answered?

Cross-Int. 88. (By Mr. LOWELL.) "And now comes Bradford Darrach, claimant of the cargo in the above-entitled case, in behalf of James E. Ward, Henry P. Booth and William H. T. Hughes, merchants and co-partners doing business in New York, under the firm name and style of James E. Ward & Co., and says that the value of said cargo is being rapidly diminished by reason of the charges of custody, and other costs and expenses, and moves for an interlocutory sale of said cargo, under the order of this Honorable Court." Do you remember signing that?

Mr. DABNEY: He does not profess to have signed it.

Mr. LOWELL: Oh, no. It is signed by his Proctor.

Cross-Int. 89. Did you authorize that, do you remember?

Ans. I don't remember the exact circumstances of that at the time.

Cross-Int. 90. You don't remember especially about it?

Ans. No; I have no definite recollection as to what the authorization was.

Cross-Int. 91. Did you think that this lumber that you saw there was fitted for the Boston market?

Ans. Not specially.

Cross-Int. 92. Well, was it fitted for the Boston market? Would it bring a fair price in the Boston market compared with its price where it was wanted?

Ans. I supposed it would bring as much here as in any market you could put it in.

Cross-Int. 93. As much here as in Montevideo?

Ans. Yes, sir.

Cross-Int. 94. You thought so?

Ans. I thought it would.

Cross-Int. 95. Were you aware, from the examination you made of this lumber, that it was sawed for house frames?

Ans. I knew generally the character of the lumber from the specifications that I had seen of this shipment. [*At the request of counsel the question was read to witness.*] Well, I can only answer it in that way.

The COMMISSIONER: The question is whether your examination told you,— whether on looking at this lumber you learned, from inspection, that it was sawed for house frames.

The WITNESS: No; I didn't gather from my inspection that it was made for house frames.

Cross-Int. 96. Did you, as the agent of James E. Ward & Co., know that this cargo was shipped under a specific order from them for certain purposes, for use at Montevideo or Buenos Ayres?

Ans. I did not know that it was a special order.

Cross-Int. 97. You wouldn't, I suppose, Mr. Darrach, consider your opinion that this was a good market for this lumber as valuable as that of lumber dealers,— that is, if we have put in evidence in this cause, evidence of lumber dealers, — their own witness and others —

that this lumber was not suitable for this market, you wouldn't suppose that your opinion was as valuable as theirs, would you?

[*Objected to, but objection subsequently withdrawn.*]

Ans. I think that is wrong. I never said that this was a good market for lumber. If I did, I had no intention of doing so.

Cross-Int. 98. I asked you only about two questions,— I asked you whether it would sell as well here as in Montevideo or any other market, and I understood you to say yes—

Ans. I said that in my opinion it would sell better here, meaning by that that it would realize less loss.

Cross-Int. 99. Oh, I hadn't asked you about that. I was not asking you to figure out the expense of getting it to Montevideo and all that—

Ans. That was what I was figuring out in giving my estimate, as to what the expense would be, and what loss it would result in.

Cross-Int. 100. I was not asking you that. I asked you whether you considered this market a good place to sell it, and you said yes; and then I asked you if it was as good as any other market, for instance, Montevideo, and you said yes. Now, it seems that you are merely figuring on what it would cost us to carry it to Montevideo.

Ans. I am figuring on what the lumber will eventually lose.

Cross-Int. 101. Yes. That is not the question that I put to you. The question was merely as to the market as a market. I don't suppose you would say it was as good a market as many others.

The COMMISSIONER: And I suppose you mean, Judge Lowell, a market for that particular kind of lumber?

Mr. LOWELL: Yes, that particular kind of lumber.

Ans. Well, my opinion was at the time that it would, as I say, produce less loss being sold—

The COMMISSIONER: That is not the question that is asked.

Cross-Int. 102. As a market, is this a good market for that kind of lumber, sawed as that was sawed?

Ans. Well, it is hard for me to divest my mind of the condition that it was in at the time.

Cross-Int. 103. Well, now, I will ask you, as a market simply, was that lumber, sawed as it was, suitable for the Boston market?

Ans. I don't think it was.

Redirect Examination by Mr. DABNEY.

Int. 104. Now, there are one or two questions that I forgot. First, you went and looked at that cargo for the purpose of ascertaining the damage, I suppose, didn't you?

Ans. I went to see the general condition of it, and see the condition of the vessel and investigate the condition of the lumber.

Int. 105. Whether it was for the purpose of ascertaining the extent of the damage?

Ans. Yes.

Int. 106. Well, now, you have spoken several times of the condition of the vessel. Can you tell us anything about the effect of the bilge water in a vessel that had had the experience and was in the condition of that vessel?

Mr. LOWELL: That we object to. That is mere guesswork. We do not know whether there was any bilge water in her or not.

The COMMISSIONER: I do not see that any condition of things has been shown by the evidence to which that question would apply.

Mr. DABNEY: There is always bilge water in all vessels.

Mr. LOWELL: You do not know how much bilge water was in this vessel, and nobody has ever testified about it.

The COMMISSIONER: The bilge water does not always come in contact with the cargo.

Int. 107. What is the effect on a cargo of that kind of having water get into the hold?

Ans. The effect is to blacken it, to stain it.

Int. 108. And do I understand you to say that if that cargo had been reshipped and carried to Montevideo, there would or would not have been any increase in damage, in the condition in which you saw it?

Ans. My opinion was that it would.

Int. 109. You can give your reasons for it, for thinking that it would.

Ans. For the reason that the longer that was kept confined in the

vessel's hold, the more tendency it would have to increase the damage.

Recross Examination by Mr. LOWELL.

Cross-Int. 110. Supposing it had been carried in the vessel after she had been repaired and was perfectly tight, and in the meantime the cargo had been in a place where it would not be wet, but would be dry, what increase of damage would there be?

Ans. I don't think that was possible in the time that the lumber had been stored here.

Cross-Int. 111. How long was that?

Ans. Well, I think, from my recollection, it was about six weeks to the date that was given when the vessel was supposed to be ready for sale.

Cross-Int. 112. December 8th, if I remember right?

Ans. She actually did sail then, but there is a different date given in the —

Cross-Int. 113. Well, you don't think that in six weeks that lumber could have been dried sufficiently to make a voyage in a sound vessel to Montevideo, without further deterioration resulting from the former wetting?

Ans. No, sir, I don't.

Cross-Int. 114. What proportion of the thirty per cent which you estimate the damage to have been, — what proportion of that do you take into account as injury from supposed bilge water?

Ans. I don't separate the —

Mr. DABNEY: I thought that that bilge water was excluded.

Mr. LOWELL: He said that the bilge water would injure her. But if that is considered excluded I will change that.

Mr. DABNEY: Well, wasn't it? I asked him about bilge water, and you said that there was no evidence that there was any bilge water in her, and I changed my question.

The COMMISSIONER: I think that it came down to the effect of water in the hold generally.

Cross-Int. 115. Then what part of your thirty per cent damage did you attribute to supposed water below hatches?

Ans. Why, the whole of it.

Cross-Int. 116. The whole of it?

Ans. Yes, sir.

Mr. LOWELL: That is all.

Int. 117. (By Mr. DARNEY.) Well, I don't understand how you leave it now.

Ans. If I understand the question correctly, — at the lowest point, I estimated the damage at thirty per cent, — the lowest figuring I *should make on it, and that damage* was estimated for water damage, — damage caused by water.

Cross-Int. 118. (By Mr. LOWELL). I see you didn't understand my question. What proportion of that was supposed to be damage by water below the deck?

Ans. I can answer that by making a statement of my experience with other cargoes, and that is, that I have knowledge of claims made on cargoes where the vessel arrived at the port of destination in regular order, simply having leaked, and having three to four feet of water in her hold, and the damage allowed on the cargo by appraisement was forty per cent on the entire cargo. I don't see how I could separate the question of damage by water below deck.

Cross-Int. 119. But your estimate was made upon supposed water below deck?

Ans. Below deck, and on deck, and going through the hatches.

Cross-Int. 120. Yes. That is what I supposed.

Ans. The hatches were open, and from reports — the statement of the captain, the sworn statement of the captain, and the condition of the vessel, and the statements of the pilots when she was picked up — the vessel had been lying in an open sea, with her hatches off, or they had been washed off in the meantime, and the water had gone down the hatches, and how far through the cargo it had gone — it had gone to the bottom, of course — I had no personal knowledge as to how much water there was in the vessel — I knew from my experience, and seeing the condition of the vessel that she had water in her.

Cross-Int. 121. Well, then, not to mean any disrespect, you just guessed at the amount of water?

Ans. I didn't guess at the amount of water: no, sir.

Cross-Int. 122. At the amount of damage caused by water, which damage you hadn't seen, except on the deck load?

Ans. Based on my knowledge of how such cargoes have turned out in such condition.

Cross-Int. 123. Exactly. And would you be willing to report to the Atlantic Mutual, or anybody else, the damage to that cargo, from what you saw of the cargo itself,— would you risk your reputation as to the damage to that cargo from what you saw on that deck?

Ans. I did risk it.

Cross-Int. 124. But you have stated that you risked it on a kind of general average notion of what similar cargoes had turned out to be, if I remember?

Ans. I based my judgment on my past experience as to what cargoes of that kind, in such condition, would result in.

Cross-Int. 125. Well, but "such condition"— you didn't know the condition except on deck— you didn't know the condition below?

Ans. Well, I thought I did.

Mr. LOWELL: Well, that is all.

Int. 126. (By Mr. DABNEY). Did you report the amount of damage to the company?

Ans. I made my report to the Atlantic Insurance Company, as to what I considered the damage would be.

Int. 127. What did you report the damage to be?

Ans. I said that if the cargo went forward to Montevideo it would be a total loss and more.

The COMMISSIONER: That was not the damage here in Boston, then,— that was a report of the possible consequences of carrying the cargo to Montevideo?

The WITNESS: Yes. My mind was working on the ultimate result.

Mr. DABNEY: I did not mean to ask for that. I thought that he reported on the damage here. That may be stricken out.

Mr. LOWELL: No; I did not suppose that you meant that. If you repeat it, I shall object to the question, what he reported.

Mr. DABNEY: Then I will leave it.

Mr. LOWELL: I object to that answer as not responsive.

Mr. DABNEY: I mean I will have that answer stricken out, and will not repeat the question.

Mr. LOWELL: Very well. Then it is stricken out.

Int. 128. (By the COMMISSIONER). I understand from your last answers to counsel that your estimate of the damage was based not only upon what you saw, but upon what you were told by the master, the pilots and other people, about the condition of this vessel?

Ans. My estimates were based upon all the information that I could gather from any source whatever.

The COMMISSIONER: Yes; precisely.

Mr. DABNEY: Well, "the condition"—I do not understand that he says it was based on her present condition, but upon what she had been exposed to.

The COMMISSIONER: Yes; I understand it was on what he was told by the master and the pilots and other people the vessel had been through.

The WITNESS: What I was told, and what I could see she had been through.

Mr. LOWELL: Of course we do not object to what he could see.

The COMMISSIONER: What I mean is, whether the element of other people's knowledge and report entered into your estimate of the damage? I understand it was based in part upon what other people had told you about this vessel's experience.

The WITNESS: Well, in a very small part, because I could see for myself what the vessel had been through; and if I hadn't seen anybody the result of my judgment would probably have been the same.

Cross-Int. 129. (By Mr. DODGE.) What experience have you ever had in going to sea, Mr. Darrach?

Ans. I have not been to sea, sir, as a sailor.

Int. 130. (By the COMMISSIONER.) I want to ask one question in consequence of this last reply: Suppose you had been told nothing by anybody, pilot, master, or anybody else, and had made simply the inspection you did make, would your estimate of the damage to that cargo have been the same as you now testified to?

Ans. Yes, sir, I think it would.

Int. 131. Then all the previous experience of these people didn't assist you at all in forming your estimate of the damage?

Ans. Not materially.

EXAMINATION OF THEODORE W. GORE.

Direct Examination by EDWARD S. DODGE, Esq.

Int. 1. Your name is Theodore W. Gore?

Ans. Oui.

Int. 2. And you are an adjuster of general averages and maritime losses in Boston?

Ans. Yes, sir.

Int. 3. For how long a time have you been, Mr. Gore?

Ans. Thirty-one years.

Int. 4. Are you acquainted with the usages and practices of adjusters in Boston in regard to ascertaining the net freight?

Ans. I think so.

Int. 5. Will you please to state whether or not there is any custom or usage prevailing among the adjusters in Boston for the ascertainment of net freight, and if so, what it is?

Ans. Yes. You take the freight to be earned on the passage and take one-third from it, and assess two-thirds of the freight on the passage.

Mr. DODGE: That is all.

Cross Examination by LEWIS S. DABNEY, Esq.

Cross-Int. 6. You say the net freight. Do you mean for the purpose of making an average?

Ans. For the purpose of assessment, and I should suppose it would imply making an average; yes.

Cross-Int. 7. Making an average?

Ans. Yes.

Cross-Int. 8. And you take off one-third of the gross freight?

Ans. One-third of the gross freight to be earned on the passage that the vessel is making —

Cross-Int. 9. You must be speaking, then, of an average to be made up before the end of the voyage?

Ans. I am speaking of any general average that I make up, I don't care whether it is made up at the beginning of the voyage — of course it can't be made up at the beginning of the voyage — but whether it is made up during an interruption of the voyage, or at its end, or at any time; — when I am asked to make up a general average the rule is the same.

Cross-Int. 10. Well, do they ever make average adjustments at a port of distress, — an intermediate port, — before the completion of the voyage?

Ans. Sometimes.

Cross-Int. 11. That, I presume, is done by agreement of the parties?

Ans. Yes.

Cross-Int. 12. Well, have you had occasion to make averages under such circumstances?

Ans. Yes.

Cross-Int. 13. In making such an average at an intermediate port, or at a port of refuge, is the apportionment made to freight, — the basis on which the apportionment is made to net freight, — two-thirds of the gross freight?

Ans. Unless there is a clause in the contract of affreightment requiring the adjustment to be made up according to the York-Antwerp rule.

Cross-Int. 14. And in the absence of any such provision in the contract, you take the net freight to be two-thirds of the gross freight?

Ans. Two-thirds of the gross freight on the passage she was then running, of course.

Cross-Int. 15. Of the freight to be paid on the termination of the voyage?

Ans. Yes, sir, so far as I have ever heard. I never heard anything to the contrary.

Int. 16. (By the COMMISSIONER.) What is that deduction of one-third for, Mr. Gore?

Ans. It is supposed — and in this I am only giving my supposition —

Mr. DABNEY: Have we any right to that?

The WITNESS: It will be found in the Massachusetts cases, and you can look at them.

Int. 17. What does that one-third that is deducted represent?

Ans. It represents the cost of earning, and it is sometimes put in as one-third, cost of earning, and sometimes as one-third off, as usual; sometimes one and sometimes the other phrase is used.

Int. 18. Suppose that you are directed as an adjuster, Mr. Gore, to take the contributory value of the cargo at its port of destination, and have to deduct the actual charges incident to ascertaining such freight —

Mr. DABNEY: I beg pardon for interrupting you, but I think that you did not mean to say "cargo." You meant to say "freight."

The COMMISSIONER: Did I say "cargo"? Well, we will see if I did. You are quite right, Mr. Dabney, and I accept the suggestion, and thank you for it.

Int. 19. Suppose you have to ascertain the contributory value of freight, and to take the gross freight, and to deduct from it certain actual and theoretical charges of earning that freight, whether or not the deduction of one-third is in accordance with the custom of the port of Boston as an equivalent for the cost of earning?

Ans. I should think so. I should assume that one-third represents those charges, and if anybody didn't like it —

Int. 20. That is not my question. My question is whether there is any custom in Boston that would justify such a deduction?

Ans. Now, I can answer that question —

Mr. DABNEY: Wait a minute. I want to understand exactly what is asked. Do you mean what he would feel himself at liberty to do in following out somebody's direction?

The COMMISSIONER: Oh, no; not at all.

Mr. DABNEY: Well, that is the way it impressed my mind from hearing the question.

The COMMISSIONER: I will try to make the question accord with

what I understand to be the direction given in this Opinion. Suppose, Mr. Gore —

Mr. LOWELL: Excuse me one moment, Mr. Magistrate.

The COMMISSIONER: Certainly, sir.

Mr. LOWELL: The Opinion directs, on page 36, "he will then ascertain what freight was in fact earned," etc.; "and, *on* the principles laid down, its net value." The principles laid down,— those are the principles you are putting to him.

The COMMISSIONER: Precisely.

Mr. LOWELL: But then it goes on to say that, if these cannot be ascertained as matters of fact, he will estimate them.

Int. 21. Suppose, upon a cargo destined to Buenos Ayres or Montevideo, a general average adjustment has to be made up at the port of Boston, and it becomes necessary to ascertain the contributory value of freight and cargo, for the purpose of such adjustment, in accordance with the custom prevailing at the port of Boston, is there any custom or manner in which the expenses of earning such freight would be ascertained in Boston; and if so, what is it?

Ans. One-third off from the gross freight; that is, I know of no other.

Int. 22. Do you know of that as a rule of adjusting in Boston?

Ans. I have followed it for thirty years, and I don't know of anybody's ever having varied from it.

Int. 23. You understand that to be the established rule in Boston?

Ans. Yes. Of course I have made up one or two statements under the York-Antwerp rule, in which I have —

Int. 24. That is another thing altogether.

Ans. Well, with that exception, I don't know that I ever saw a case made up — in Boston, certainly — not in any of the offices in which I was brought up, or in any in which I was a partner — in which any other rule was adopted.

EXAMINATION OF GJERT LOOTZ.

Direct Examination by EDWARD S. DODGE, Esq.

Int. 1. Mr. Lootz, do you know whether or not, upon the arrival of the bark Eliza Lines at Boston on this occasion, there was any water in the hold?

Ans. I was told there had been no more water in her than usual. Every ship has a little water.

Int. 2. Were you on the ship yourself at times?

Ans. I was; the very day after she arrived at Lewis' Wharf, I was.

Int. 3. Were you there during the process of discharging her?

Ans. That was at the New England Dock, and I was there, I should think, two or three times, though it is a long time ago.

Int. 4. Did you ever see any water in her hold, or any evidence of water having been in her hold?

Ans. None.

Int. 5. (By the COMMISSIONER.) Did you go into her hold at all, or look in?

Ans. Oh, yes; I was at the hatch looking down many times.

Cross Examination by LEWIS S. DABNEY, Esq.

Cross-Int. 6. Mr. Lootz, if Mr. Whidden, Mr. Sweetland and Mr. Fredriksen, the surveyors, on the twenty-fifth of September, 1889, reported that they "found a large body of water in the vessel, sounded in well-room, found nine feet, seven inches, and as the vessel is two and one-half feet by the head, would give her twelve feet of water forward," would that indicate any water in the hold?

Ans. That would certainly indicate some water; yes.

Mr. DODGE: Now, Mr. Dabney, did you say that you were willing to state what the cost was at the port of shipment?

Mr. DABNEY: I did, sir, subject to all objections to its competency. I did not admit it to be competent. I cannot state the value, Mr. Dodge. I can state the cost of the cargo at the port of shipment.

Mr. DODGE: Well, that is good enough.

Mr. DABNEY: I will tell you what it is.

Under deck:				
14,761 pcs.	260,334 ft.	pitch pine at	$11.75	$3,058.92
On deck:				
746 "	34,200	" "	"	401.85
15,507 "	294,534 ft.		Total,	$3,460.77

Mr. LOWELL: Mr. Dabney, in connection with this question of value, it appears, on page 47 of the record, that the total loss on the cargo was $4,560.

[*This closed the evidence.*]

[*Adjourned till Monday, October 12th, 1896, for argument.*]

[*Stenographer's transcript of further testimony of Gjert Lootz before John D. Bryant, Commissioner.*]

BOSTON, October 12, 1896.

Direct Examination by EDWARD S. DODGE, Esq.

Mr. LOOTZ: I must be allowed to say that I rely on my memory largely in this matter. I have a few notes taken from my books. This happened eight or nine years ago, and I do not remember exactly all about it.

Int. 1. Mr. Lootz, in the course of your business have you had experience in the making of repairs on vessels?

Ans. Yes, I have for a great many years.

Int. 2. Are you familiar with the survey here of Messrs. Whidden, Sweetland and Fredericksen as to the repairs that were necessary on the Eliza Lines?

Ans. I appointed them and went over the survey with them several times.

Int. 3. Did you visit the vessel yourself at any time?

Ans. Several times; yes. Especially while she was discharging.

Int. 4. Now I wish to ask you at what time, in your judgment, if the Eliza Lines had been allowed to reload her cargo and continue

her voyage, she could have gotten away, having made the repairs recommended in the survey?

[*Objected to.*]

Ans. Well, I shall have to produce these notes and give the statement the best I know how.

Mr. DABNEY: I object to witness using notes taken from his books.

The COMMISSIONER: Well, he may be allowed to refresh his memory with the notes.

The WITNESS: Well, this happened a long time ago, and this memorandum only has three dates on it. This vessel arrived in Boston, September 19, 1889. If she had been allowed to discharge her cargo she would begin on September 22. It would then have taken us at the utmost, weather permitting, ten days to discharge that cargo. We would then require one day to move the ship to dry dock, and five days in dry dock. It would take us two days more to get ready to take on board the cargo, and I must say, weather permitting again, it would take us twelve or fifteen days to reload the cargo. We would then require two days to get her through the custom house and get the papers in order, at which time she was ready to go to sea.

The COMMISSIONER: How much in all would that be?

The WITNESS: I have not figured it.

Int. 5. When you say how long she would have to be in dry dock, do you think she would have completed her repairs in that time?

[*Objected to.*]

Ans. In dry dock, and in accordance with the survey.

Int. 6. Assuming the voyage, the average voyage, from Boston to Montevideo at that season of the year to be sixty days, when, in your judgment, could she have discharged her cargo, reloaded her cargo after repairs and proceeded and arrived at Montevideo?

[*Objected to on ground that it is an inference for the Commissioner.*]

The COMMISSIONER: It seems so to me.

Mr. DODGE: I waive the question, and will not ask any more questions.

Cross Examination de bene esse by LEWIS S. DABNEY, Esq.

Cross-Int. 7. Mr. Lootz, when the vessel arrived here she was in the possession of the salvors, wasn't she?

Ans. She was.

Cross-Int. 8. When did the master get possession of her?

Ans. It must have been about two or three days.

Mr. DABNEY: I object to the exhibition of documents to witness during cross-examination, by his counsel, to aid him in answering.

The WITNESS: You ought to have some compassion on a man's memory about a thing so long ago. Two or three days after she arrived I feel pretty sure that the captain had charge of her. I think he was allowed in two or three days to go aboard of her and get his things.

Cross-Int. 9. That is not what I want, whether he was allowed to go aboard. When did he get possession of the boat?

[*Objected to as being a matter of record.*]

The COMMISSIONER: I think in cross-examination this may be allowed.

Ans. I should say in five or six days after she arrived the marshal released her, as far as my memory goes.

Cross-Int. 10. When did they begin to discharge the cargo?

Ans. That was after the judge's opinion was rendered, after November 16.

Cross-Int. 11. After that they began to discharge the cargo?

Ans. Yes, sir. They would not be allowed to discharge her before. That is my recollection, the best of my knowledge, that they began to discharge after the judge's opinion was rendered.

Cross-Int. 12. When were the repairs on her begun?

Ans. Repairs were begun after she was discharged. She went into dry dock — or partially discharged.

Cross-Int. 13. Then the repairs were not begun until after the judge's opinion on 16th November?

Ans. No. That is the way I remember it.

RE THE ELIZA LINES, HER CARGO AND FREIGHT.

The foregoing typewritten report on four pages of paper [pp. 338, 339, 340] is identified by me as the report furnished by the stenographer of what purports to be to that extent the testimony of Gjert Lootz. I believe the same to be a correct report of the testimony it purports to transcribe. Such testimony was given before me at a hearing in the above-entitled cause on the twelfth day of October A.D. 1896.

JOHN D. BRYANT, *Commissioner.*

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

No. 3545.

THE ELIZA LINES, HER CARGO AND FREIGHT.

EXCEPTIONS OF THE OWNERS OF CARGO AND OF JAMES E. WARD & CO. TO THE COMMISSIONER'S REPORT AND SUPPLEMENTAL REPORT.

[FILED JUNE 10, 1890.]

And now the Report and Supplemental Report of John D. Bryant, Esquire, the Commissioner in this cause, having been filed, the owners of cargo and James E. Ward & Co. come and file these their exceptions to the same, and pray that they may be allowed.

1. For that the said Commissioner has taken the contributing values of different contributing interests in general average at different places and different times, when by law the same should all be taken at the same place and time.

2. For that the Court having directed that the contributing value of said bark Eliza Lines in general average should be taken to be her value on arrival at Boston on September 19, 1889, and that general average should be adjusted according to the customs prevailing at the port of Boston, the value of said cargo at Boston in said September, 1889, should have been taken as the contributing value of said cargo in general average, and the Commissioner has taken as the contributing value in general average of said cargo what he has found to have been its value at Montevideo or Buenos Ayres in January, 1890.

3. For that the Commissioner has not taken as the contributing value of the cargo in general average its value in Boston in September, 1889.

4. For that the said Commissioner has taken for the contributing value of cargo in general average what he has found to have been its value in Montevideo or Buenos Ayres in January, 1890.

5. For that the said Commissioner has taken in general average for the value of the cargo jettisoned its value in Montevideo or Buenos Ayres in January, 1890, and has not taken as the value of said jettisoned cargo in general average its value in said Boston in September, 1889.

6. For that the said Commissioner has found that the sound value at Montevideo or Buenos Ayres of the cargo of the Eliza Lines at the time said Eliza Lines should have arrived at said Montevideo or Buenos Ayres, which the Commissioner has found to have been January 1, 1890, was $40 per thousand, and there was no competent evidence before the Commissioner of the sound value of said cargo at said Montevideo or Buenos Ayres at said time or at any other time, or any competent evidence of the value of yellow pitch pine lumber at said Montevideo or Buenos Ayres at said time or at any time, sound or unsound, and the only evidence before said Commissioner in respect to such value was incompetent, and was duly objected to by said owners of cargo and said James E. Ward & Co.

7. For that it appears from the evidence reported by said Commissioner and returned by him with his report, that there was no evidence before him that in January, 1890, or at any other time, yellow pitch pine lumber, or such lumber as constituted the cargo of said Eliza Lines, was worth at said Montevideo or Buenos Ayres forty United States dollars per thousand feet, the value of the same found by said Commissioner.

8. For that said Commissioner has found that a deduction of ten per cent from the net sound market value at Montevideo or Buenos Ayres of all the cargo of said Eliza Lines at the time when he finds said vessel should have arrived at said Montevideo or Buenos Ayres would fully cover damage to said cargo and depreciation of market value in consequence of sea perils, to which the said cargo was exposed, before the arrival of the said vessel in Boston in September, 1889, when he should have found said damage to be at least thirty-three and one-third per cent.

9. For that it appeared before the said Commissioner by the record of the Circuit Court in this cause that the bark Eliza Lines was delivered to her master by the marshal in Boston October 5th, 1889, and in the petition of said master set forth in said record dated 18th October, 1889, it is stated that the petitioning master has partly repaired the bark and is about to complete her repairs. And it further appears from the deposition of G. Lootz in said record that the said bark was not ready to take on cargo after her repairs until December 12th, 1889. And it further appears from said record that the Court has found "that the repairs and all the proceedings by the master and vessel were conducted with great diligence," and that the vessel "was ready for sea at least as early as December," and yet the Commissioner has found that the said bark, if she had been allowed to reload her cargo and complete her voyage, would have arrived at Montevideo or Buenos Ayres by January 1, 1890, when he also finds that the average length of voyage from Boston to Montevideo or Buenos Ayres is fifty-five or sixty days, whereas said Commissioner should have found that said bark, if she had been allowed, when ready to take on cargo after her repairs as aforesaid, to reload her cargo and complete her voyage, could not have sailed from said Boston until after said 12th December, 1889, and could not have arrived at said Montevideo or Buenos Ayres before February 7, 1890.

10. For that it was agreed before said Commissioner on behalf of all the parties by their respective counsel that the average length of voyage from Boston to Montevideo at the time when said bark, if she had been allowed to reload her cargo and complete her voyage, would have been pursuing said voyage was sixty days, and the Commissioner has rejected said agreement and has found upon the evidence the average length of voyage from Boston to Montevideo or Buenos Ayres to be fifty-five or sixty days.

11. For that the said Commissioner has not deducted from the net freight, which he finds the said bark would have earned in case the cargo had been reladen and the voyage completed, the whole of the net freight found by him to amount to $1,936, which he finds the said bark earned on her voyage to Lisbon, where he finds she ar-

rived on February 7, 1890, but has deducted only 45/83 of said net freight.

12. For that the said Commissioner has charged the said cargo owners and said James E. Ward & Co. with the net freight to Montevideo or Buenos Ayres on the whole of said cargo, when it appears that 45 per cent of said cargo was appropriated at said Boston to the use of the salvors, and allowed as salvage, and said net freight should have been charged only on the remaining 55 per cent.

13. For that the said Commissioner has taken the value of the whole cargo for its contributing value in general average, whereas it appears that 45 per cent of said cargo was appropriated in Boston to the use of the salvors, and allowed as salvage, and only 55 per cent of said value should have been taken as the contributing value of cargo in general average.

14. For that the said Commissioner has included among the charges to be contributed for in general average, a commission for advancing and paying on general average, amounting to $224.67.

15. For that said Commissioner, in allowing the objection numbered 16 of the objections of owners of cargo and of James E. Ward & Co. to his draft report, which objection claims that the sum of $53.33 allowed in general average for loss of freight on jettisoned cargo should be deducted from the freight charged against said owners of cargo and said James E. Ward & Co., instead of deducting the whole of said sum of $53.33, has deducted only two-thirds thereof, being the sum of $35.56, while leaving the amount to be contributed for in general average for freight lost by jettison of cargo the full sum of $53.33. If only net freight lost is to be deducted from the amount to be charged against James E. Ward & Co., then only net freight lost and not gross freight lost is the amount to be allowed and contributed for in general average for loss of freight. Gross freight, as per charter party, after deducting one-third, appears, by the report, to be $3,775.05, which is the full amount of net freight without loss. But the sum of the amounts for freight allowed by the Commissioner in his Report and Supplemental Report, namely $3,739.49, against James E. Ward & Co. and $53.33

in general average is $3,792.82, being in excess of the greatest possible amount of net freight.

16. For that the said Commissioner has allowed in general average to freight for loss of freight on jettisoned cargo, the gross freight of the same to Montevideo or Buenos Ayres, as per charter party, being $53.33, whereas he should have allowed only net freight and should have deducted one-third from said gross freight and have allowed only $35.56.

17. For that while the Commissioner in adjusting the general average has included two theoretical charges, which have not been and are not to be paid by any one, to-wit, commission for advancing and paying on general average $224.67, charge for reloading cargo at Boston $319, the latter of which is admitted to be a legitimate charge in the adjustment while it is denied that the former is a proper charge in such adjustment, yet the Commissioner, after ascertaining the contributions payable by the several interests upon such theoretical adjustment, in condemning said owners of cargo and said James E. Ward & Co. to contribute $2,225.24 towards the sum of an adjustment thus made up, and including two theoretical charges which have not been and are not to be paid by anybody, has not deducted from said sum of $2,225.24 the proportion contributed in said average by cargo to said two theoretical sums amounting to $543.67, thereby condemning said owners of cargo and said James E. Ward & Co. to pay cargo's proportion of said $543.67, when no one is entitled to receive the same.

18. For that the said Commissioner, in declaring that the balance found in conformity with the directions of the Court to be due from James E. Ward & Co. on account of both freight and general average, must be erroneous, because less than the amount found to be due from said James E. Ward & Co. on account of general average alone, has overlooked the fact that said balance is less because there has been deducted from it the sum of $1,708.39 already applied in the District Court in payment of freight and general average from proceeds of sale of cargo, and by deducting also the net freight found to have been otherwise earned by the bark Eliza Lines, amounting to $1,049.62.

19. For that the said Commissioner, in allowing the objection

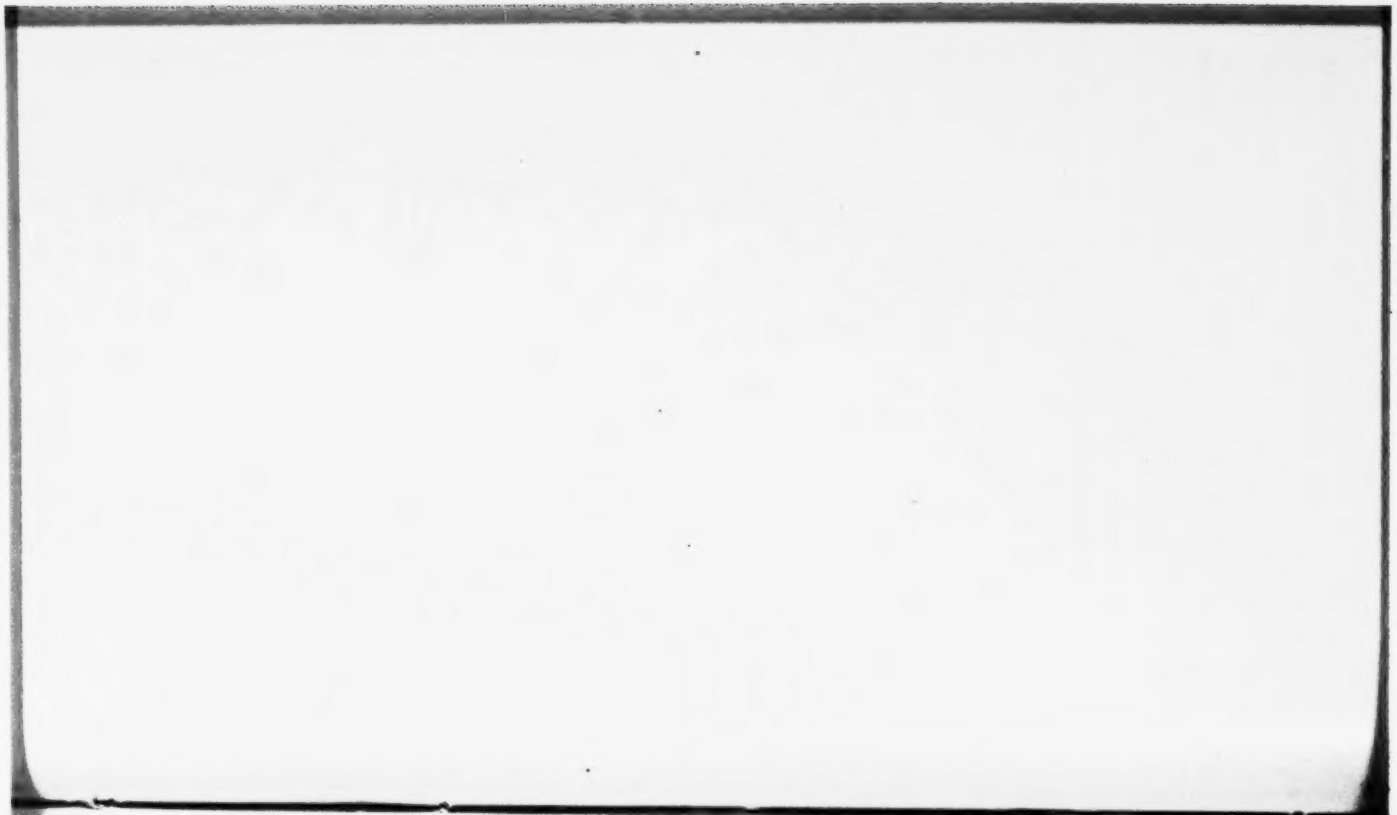
numbered 11 of owners of cargo and of James E. Ward & Co. to his draft report, has departed from the directions given by the Court for the ascertainment of the amount due from James E. Ward & Co. for freight and general average, and in the capacity of *amicus curiae* has suggested a different rule from that laid down by the Court.

20. For that the said Commissioner has reported $3,110.72 as the amount due from James E. Ward & Co. for freight and general average.

21. For that the said Commissioner, while finding that the amount due from said James E. Ward & Co. for freight and general average in conformity with the directions given by the Court is the sum of $1,585.29, has not reported said sum of $1,585.29 so found in conformity with said directions to be the amount due from said James E. Ward & Co. for freight and general average, but has reported a different and a larger sum.

By their Proctors,

L. S. DABNEY,
F. CUNNINGHAM.



Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

No. 308.

THE ELIZA LINES, HER CARGO AND FREIGHT. CONSOLIDATED CAUSE.

OPINION OF THE COURT.

APRIL 20, 1900.

PUTNAM, J. The question before the court is that of confirming the report of the commissioner, appointed in accordance with the opinion passed down on April 3, 1894. The commissioner has, in the main, pursued the course marked out in that opinion, and his report is of the utmost value to the court in disposing of the case. No exceptions have been filed except by James E. Ward & Co. Near the close of our prior opinion, we directed that all things decreed by the District Court should be followed except as otherwise provided for or modified by us. This had relation to what was in fact decreed, and it had none to the report of the assessor in that court, estimating that the amount to be contributed for general average was $4,818.01. This estimate was not confirmed by the District Court, nor made the basis of any decree. The details of the assessor's estimate were stated and accepted by the commissioner, and they include: "Commission on advancing and paying out general average five per centum, $224.67." This is now excepted to on the ground that this amount was never in fact paid by the owners of the vessel. The commissioner also included in his estimate of the amount of general average charges an item of $319, supposed cost of reloading the cargo at Boston. These two items stand in the same general category, and will be referred to again.

The cargo was sold at Boston, the record shows, for the gross amount of $1,825. From this were paid the charges of sale, amounting to $116.61, which, of course, are no part of the general average, leaving $1,708.39, which was paid into the registry of the court as net proceeds. The cost of discharging the cargo, pumping the vessel, wharfage and storage, allowed by the District Court, was $1,051.09. Of this the District Court apportioned to the cargo $797.65, and to the vessel $253.44, The $797.65 was paid out of the registry, leaving net $910.74 therein, as proceeds of the cargo. That court allowed the vessel *pro rata* freight to the amount of $1,450, and directed that the $910.74, net proceeds of the cargo in the registry should be applied towards the payment of freight. Thus it was, as said in our prior opinion, that the proceeds of the cargo were applied to the payment of freight and general average, because the charges for discharging cargo, pumping, storage and wharfage were of the latter class. The proceeds of the cargo thus applied to the payment of freight became, therefore, the property of the owners of the vessel, and were consequently again applied by the District Court towards the payment of salvage on the vessel and of freight. Following strictly the terms of our previous opinion, we should confirm this application made by the District Court, and regard so much of the proceeds of the cargo as amounted to $797.65 as applied towards general average charges, and $910.74 towards the payment of freight. We will refer to this again.

The District Court decreed that the salvors recover against the vessel and her cargo $750 for salvage, and also their costs of suit taxed at $313.61. It apportioned these sums between $2,250, the valuation of the vessel, and the $910.74 which the court applied towards payment of freight. If its decree in this particular should be literally construed, the salvors would have been allowed nothing on account of the cargo. Therefore, in our earlier opinion, we held this to be substantially an allowance for the salvage of the vessel and cargo only, and we directed an additional allowance for salvage services and expenses touching the freight, payable only from sums to be realized from James E. Ward & Co.

The main issue raised by the exceptions to the commissioner's report grows out of this expression in our former opinion with reference to adjusting general average: "The value of the vessel

on arrival at Boston will be taken at $2,250. In other respects, general average will be adjusted on the same principles as though the voyage had been subsequently completed, and according to the customs prevailing at the port of Boston." This was stated very briefly, and the court now perceives that it would have been better to have stated it more fully. However, a careful consideration of the principles expressed in the opinion, on which it proceeded, leaves no doubt as to its proper inetrpretation. We held that, in the eyes of the law, the charterers, James E. Ward & Co., without right, broke up the voyage at Boston, when they should have permitted the vessel to reload the cargo, and deliver it at Montevideo or Buenos Ayres according to the terms of the charter-party. It followed, as all must see, that the charterers were liable to make good in all respects as though the voyage had been completed. This, of course, can not be done in form or *in specie*, but it can be accomplished in substance. Therefore, the charterers were decreed to pay net freight, estimated on the principles pointed out in the opinion, and, also, they were, of course, liable to contribute towards the general average on the same principles on which they would have contributed if the voyage had been completed, and the general average computed at the end of the voyage, as it would have been in due course. Very likely, a literal following out of the consequences of this proposition would have required us to direct that the general average should be adjusted according to the customs prevailing at the River Plate; but the voyage was in fact broken up at Boston, and the adjustment was necessarily to be made there. The place of adjustment of general average is a question of convenience rather than of theory. The rules are largely artificial; and, as it is impracticable from the nature of the thing to do exact justice, the whole matter of general average is *judicium rusticum*. There is nothing in the record, and nothing was brought to our attention, to show that the practical results of an adjustment according to the customs at the River Plate would substantially differ from those of one made according to the customs at Boston, notwithstanding we are quite of the impression that, in at least two particulars, an adjustment according to the customs prevailing at Boston would be more favorable to James E. Ward & Co., as will appear from what we will say further on. The justice of our propositions would be illustrated by

taking the diversities in practice as shown in a general way by Gow's Marine Insurance (1895), at pages 304 and 305, and undertaking to construct an adjustment throughout according to any particular custom there explained. How far, as applied to this case, modifications in certain directions required by any customs there explained, other than those of Boston, would be offset by other modifications, neither party has presented anything which will enable us to determine, or to cause us to hold, that the net result would be materially modified. On the whole we could see no reason why we should complicate the computations in this case by referring the parties to the customs of Buenos Ayres or Montevideo, when the customs of Boston were under our hands. The commissioner has followed our directions in this respect.

The commissioner makes the general average charges $6,434.10. The only items questioned are those of $224.67 and $319, already referred to. Although these are items which ordinarily enter into adjustments of general average, yet there is no equity in compelling contribution for what was in truth saved to the vessel by the fact that James E. Ward & Co. took possession of their cargo at Boston. Of course, the item of $224.67, which appeared in the assessor's report to the District Court as a "commission for advancing and paying on general average five per centum", was not in fact paid in that particular form, because there was no general average adjustment. Nevertheless, the vessel was compelled to make the repairs which entered into the hypothetical adjustment. The commission was computed by the assessor in the District Court on only the general average items which went into the cost of repairs, after the deduction of one-third for new. It covered no part of the items added to general average by the commissioner, which include $1,051.09, the cost of discharging, pumping, wharfage and storage. As the vessel was foreign, and as she in fact made the repairs estimated by the assessor, it is to be assumed from common knowledge that she, in some form, paid the commission allowed. On the other hand, the item of $319 was clearly not paid, and, on a correct adjustment, should be deducted.

We come to the contributory values which the commissioner placed on the vessel, freight and cargo. James E. Ward & Co. object that he has taken the value of the whole cargo, yet that he should have deducted forty-five per cent. thereof, which they say was

appropriated in Boston to the use of the salvors. Under some circumstances, salvage becomes a matter of general average; but, under the circumstances of this case, it constitutes particular averages against the vessel, cargo and freight severally. Dixon's Marine Insurance and Average, 2d ed., 102; Lowndes's Law of General Average, 4th ed., 149; Gow's Marine Insurance, 285. As, however, these particular averages arose out of the peril which rendered necessary the general average, they are to be deducted in ascertaining contributory values. It is only necessary for this to refer to Phillips on Insurance, 5th ed., § 1402. The reductions, however, would not be theoretically forty-five per cent., nor would they be from the cargo alone. The values of freight and vessel would also be reduced. The salvage awarded against the vessel was $1,249.32, and, as we have explained, against the cargo, $505.68. If account were to be taken of the taxed costs, they would follow the same proportion. Adding to the salvage awarded against the vessel the amount which, according to the final determination of this case, must be awarded against the freight, and deducting these several sums from the contributory values given by the commissioner to freight, vessel and cargo, as must be done if the exceptions of James E. Ward & Co. in this particular are regarded, the result would be to their detriment, and would more than offset what they have lost by the addition to the general average charges of the item of $319, to which we have already referred.

James E. Ward & Co. also filed a group of exceptions to the report in various forms, the substance of which is that they object to it on the ground of its refusal to take the sale of the cargo at Boston as fixing its contributory value. In this connection they say the commissioner has taken the valuations of the respective contributories, vessel, freight and cargo, at different periods of time; and, especially, they insist that, while the valuation of the cargo is taken as of the time of its arrival at the River Plate, that of the vessel is taken at Boston In determining the value of the vessel, the commissioner added to her appraisal at Boston, $2,250, as directed by our opinion, the benefits which she derived from the general average. This is correct on the theory that the adjustment is to be made on the values at the River Plate, but according to the customs at Boston, as we directed it should be made. The repairs of the vessel

cost quite an amount in addition to what went into general average, so that her value at the River Plate might be considered to be more than her appraised value at Boston, plus the benefit she received from general average; but her contributory value at the River Plate would be precisely what the commissioner has made it. For him to have increased her value as of the time of her arrival at the River Plate beyond the result of his computation would be a violation of the well-settled rule stated everywhere, but, especially in section 1402 of Phillips on Insurance, to which we have already referred.

The insistence of James E. Ward & Co. that all contributory values should be taken as of the same time is clearly wrong. The rules according to the custom at Boston are stated in Dixon's General Average (1867), at pages 8 and 172, which shows that the value of the vessel is obtained by taking her value at the port of refuge and adding to it the benefit which she received from general average, while the value of the cargo is taken according to the place and time of its arrival at the port to which it was destined. This is shown more clearly in Dixon's Marine Insurance and Average (1876), at pages 343 and 345.

No complaint is made by James E Ward & Co. of the contributory value of the freight as fixed by the commissioner. This was clearly in accordance with the custom of the port of Boston, although, if it had been made according to the custom at the River Plate, it might have been less advantageous to them, because the deduction there from the gross freight would probably have been one-half, instead of one-third, as it is according to the custom which the commissioner followed. Moreover, at the River Plate, the ship would probably have contributed for only one-half of its value and the cargo for the whole, so that, in this respect also, James E. Ward & Co. might have been gainers, and not losers.

There is one minor item to which the exceptions relate, but, on the whole, we are satisfied that the result of the adjustment of general average made by the commissioner was favorable to James E. Ward & Co. Therefore, as the other parties have not excepted to the report, and as we are satisfied that James E. Ward & Co. cannot complain of the net result of the commissioner's adjustment of general average, we are of the opinion that we are not required to recommit the case to the commissioner, and thus cause

further long delay in the litigation, merely because the commissioner has proceeded in the particulars to which we have referred on certain mistaken theories, while a recommitment could not be of any practical advantage to the excepting party.

We have not, in this connection, overlooked the objections taken by James E. Ward & Co. to the value which the commissioner has put on the cargo on the theory that it had arrived at the River Plate. Our first impressions were that the value was excessive, and that sufficient deductions were not made for its damaged condition. We were especially impressed by the fact that, if its actual value if delivered at the River Plate would have been so far in excess of its invoice value as the report makes it, James E. Ward & Co. would not have permitted it to be sold at Boston, but would have sent it forward, either in the Eliza Lines or in some other vessel. Nevertheless, the commissioner investigated the matter with evident care. Quite an amount of testimony was taken by him as to values, and the only proof offered in behalf of James E Ward & Co. was the evidence of their own agent, who represented them in the proceedings at Boston about the vessel, and who was still interested in their behalf. It is true that this agent is evidently a man of experience in this particular; but, on the question of values, the commissioner had what he was entitled to accept as positive evidence of sales of similar cargoes at the River Plate, at or about the time to which this litigation relates. Of course, he was not required to accept the opinions and estimates of the witness produced in behalf of James E. Ward & Co., in view of the relations which the witness sustained to them; and his testimony did not go beyond opinions and estimates. On the whole, notwithstanding our first impressions, we do not find sufficient to justify us in disturbing the valuation put by the commissioner on the cargo, having in regard the weight which the Supreme Court has frequently said should be given to conclusions of masters, assessors and commissioners.

The remaining important question is that of the amount for which a decree should go against James E. Ward & Co. for freight. On this question, both parties have cited to us the judgment of Lord Mansfield in *Luke* v. *Lyde*, 2 Burr. 882. James E. Ward & Co., relying on this, maintain that they should not be charged with freight on the portion of the cargo represented by the award to

the salvors, which they also compute for this purpose as forty-five per cent. thereof. Undoubtedly, some of Lord Mansfield's expressions sustain this proposition; and like expressions of Mr. Justice Story are found in *The Nathaniel Hooper*, 3 Sumner 542, 552. Mr. Justice Story cited, and, apparently, relied on *Luke* v. *Lyde*, but the facts before him were entirely unlike those at bar; because, in the case before him, the ship was sold under an admiralty decree, and was not able to go forward with her cargo, and the only question was one of freight *pro rata*, which is not at all the question here. These references are against the underlying principles of the maritime law with reference to payment of freight. Mr. Justice Story has stated the pith of these in *Jordan* v. *Warren Ins. Co.*, 1 Story, 342, 353. As is there said by him, nothing is better founded in the law than that ships are bound to receive full freight if the cargo is carried to the port of destination, and specifically remains, notwithstanding, at its arrival, it is, by reason of sea damage, even worthless. According to the ordinary rules of maritime law, the cargo being delivered the freight is earned; and no exceptions are made because the cargo is subject to either general average or particular average charges. *Luke* v. *Lyde* is cited on various points, but it is not referred to as establishing the proposition now made by James E. Ward & Co, either by Carver, Abbott, Maclachlan, Wheeler, Leggett or Scrutton. Moreover, neither of these authorities lays down the rule claimed by James E. Ward & Co., although in them we have practically referred to the whole body of the law. In *Metcalfe* v. *Iron Works*, 1 Q B. D. 613, 620, *Luke* v. *Lyde* is cited as illustrating the rule of freight *pro rata;* and when the same case came before the Court of Appeal in 2 Q. B. D. 423, 427, *Luke* v. *Lyde* was again referred to by Lord Coleridge, then Chief Justice, with reference only to the same subject-matter. In Maclachlan's Treatise on the Law of Merchant Shipping, 4th ed., at page 519, *Luke* v. *Lyde* is criticised, although not on the precise point which we are considering. We, therefore, do not think we are called on to accept this authority as against what seem to us the fundamental principles of the law of carriage by sea; and, so far as this point is concerned, we sustain the report of the commissioner.

On the other hand, *Luke* v. *Lyde* is cited by the opposing parties as sustaining the proposition that the court was wrong in not award-

ing against James E. Ward & Co. the gross freight for the voyage. In some respects, at least, they have misapprehended the rule laid down by us. The proposition is made that the court forbids that the vessel be reimbursed for her expenses in preparing for her voyage, and, also, her actual expenses from Pensacola to Boston. But our directions were explicit to deduct from the gross freight only such charges as were saved to the vessel. *Luke* v *Lyde* refers to a determination of the House of Lords in 1733, in *Lutwidge* v. *Gray*. The best statement of that case within the reach of the court is found in Maclachlan's work, already referred to, at page 502. There is a class of well-recognized cases, like *Tindal* v. *Taylor*, 4 E. & B. 219, which asserts the often repeated rule that the cargo-owner cannot take his cargo pending the voyage, except on payment of gross freight; but *Luke* v. *Lyde*, and other decisions of that character, when they speak of full freight, refer to full freight as distinguished from freight *pro rata itineris*, and none of them had occasion to discuss the method of determining what is full freight.

Both with reference to this topic, and, also, with regard to the fact that we directed deduction from the estimated net freight to the River Plate of the net freight to Lisbon, we must follow modern rules, which give only actual damages, except where vindictive damages are allowed, which is not permissive in the case at bar. Following these rules, no damages can be recovered in excess of the net injury suffered, and we must hold that it is the duty of every person damaged to take reasonable measures to diminish the effects thereof. This is now the universal rule, applied in *Nashua Iron Co.* v. *Brush*, 91 Fed. Rep. 213, 221. Therefore, it was the duty of the Eliza Lines, after James E. Ward & Co. took possession of her cargo, not to lie idle, but to secure another freight if one could be obtained. We have, therefore, no doubt that we were justified, on this question of the amount of net freight to be paid by James E. Ward & Co., to do exact justice between the parties, as was determined by our prior opinion.

The commissioner fell into an error in estimating the date from which the theoretical voyage to the River Plate should be computed. Until November 16, 1889, the cargo was in the hands of the court. Neither James E. Ward & Co. nor the owners of the bark are responsible for the delay which ensued therefrom. It was not until

that time that the cargo was discharged, and the vessel commenced her repairs. These were concluded about December 12; and the time for completing the voyage to the River Plate should be computed from that date. The voyage to Lisbon was undoubtedly completed within the period within which the voyage to the River Plate might have been completed theoretically. Therefore, James E. Ward & Co. should have received the benefit of the whole net Lisbon freight. On the other hand, the commissioner made an error in arriving at the net freights for this purpose by deducting from the gross freights one-third thereof. This was not in accordance with the instructions of the court, which was to compute the estimated charges of completing the voyages from Boston to the River Plate on the one hand, and from Boston to Lisbon on the other, according to the general rules found in Williams & Bruce's Admiralty Practice, 2d ed., 101, 102. The custom at Boston for arriving at the contributory value of freight cannot be accepted for the determination of net freight for the purposes of this part of the case. That the result was inequitable is at once seen from the fact that the deduction made by the commissioner from gross freight, covering the problematical expenses of earning it between Boston and the River Plate, was $1,869.75, while the like deduction for the voyage from Boston to Lisbon was only $968. Theoretically, the voyage from Boston to the River Plate would have cost only one month's more wages than that to Lisbon, with a slight addition for insurance and interest, while the voyage to Lisbon was chargeable with many incidents at Boston with which the theoretical voyage to the River Plate would not have been. The proper deduction for each voyage, therefore, must amount to substantially the same sum. Balancing, therefore, the error of the commissioner in giving James E. Ward & Co. the benefit of only a *pro rata* of the voyage to Lisbon against the errors in deductions from gross freights to obtain net freights, we are impressed with the belief that, all corrections being made, the net result would be substantially unchanged.

On the whole, we conclude to accept the gross amount awarded by the commissioner against James E. Ward & Co. for freight and general average. The final decree, therefore, will cover against James E. Ward & Co. $1,585.29, with interest according to our prior opinion. So far as concerns the interests of the salvors, the decree may run

directly in their favor against James E. Ward & Co. for the amount determined by the commissioner, $996.33, with interest according to our prior opinion, the same being a part of the gross sum of $1,585.29.

It is apparent that, in view of what we have said in this opinion, the total amount due from James E. Ward & Co. might, as we have already suggested, be distributed between freight and general average, and the amounts paid, or payable, as such from the proceeds of the cargo paid into the registry of the court, as we have pointed out, deducted respectively from each; but no interest which we perceive requires this. If, however, parties show cause therefor, it may be done.

The appellants will, on or before May 1, file a draft decree in accordance with our prior opinion, as supplemented by this opinion, and James E. Ward & Co. may file corrections thereof on or before May 10.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1900.

THE ELIZA LINES, HER CARGO AND FREIGHT.

No. 368.

HENRY P. BOOTH, Appellant,

v.

CATHARINE T. BLACK, Administratrix, et al.

No. 369.

CATHARINE T. BLACK, Administratrix, Appellant,

v.

BRADFORD DARRACH et al.

No. 370.

BANQUE DE GÊNES, Appellant, *v.* BRADFORD DARRACH et al.

No. 371.

HANS ANDREASEN, Appellant, *v.* BRADFORD DARRACH et al.

TRANSCRIPT OF RECORD.

VOLUME II.

RECORD IN CIRCUIT COURT ON CONSOLIDATION OF CASES.

Volume I. contains

(1) Records in Circuit Court before consolidation of cases;
(2) Opinion of Circuit Court, April 3, 1894;
(3) Commissioner's Report;
(4) Opinion of Circuit Court, April 20, 1900.

LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
for HENRY P. BOOTH *and* BRADFORD DARRACH ET AL.
EDWARD S. DODGE,
for CATHARINE T. BLACK, ADM'X, *and* BANQUE DE GÊNES.
JOHN LOWELL,
JAMES A. LOWELL,
for HANS ANDREASEN.

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.
1901.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1900.

THE ELIZA LINES, HER CARGO AND FREICHT.

No. 368.

HENRY P. BOOTH, APPELLANT,

v.

CATHARINE T. BLACK, ADM'X, ET AL.

No. 369.

CATHARINE T. BLACK, ADM'X, APPELLANT,

v.

BRADFORD DARRACH ET AL.

No. 370.

BANQUE DE GÊNES, APPELLANT,

v.

BRADFORD DARRACH ET AL.

No. 371.

HANS ANDREASEN, APPELLANT,

v.

BRADFORD DARRACH ET AL.

TRANSCRIPT OF RECORD OF CIRCUIT COURT.

[FILED IN CIRCUIT COURT OF APPEALS, JANUARY 11, 1901.]

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Tuesday, the fifteenth day of May, in the year of our Lord one thousand nine hundred.

Before

THE HONORABLE FRANCIS C. LOWELL,
District Judge.

IN ADMIRALTY.

No. 368, CONSOLIDATED CAUSE.

THE ELIZA LINES, HER CARGO AND FREIGHT.

The Transcripts of the Records of the District Court of the United States for this District, in this cause, were duly filed and entered here at the May Term, A. D. 1891, of this court, and numbered and entitled on the docket as follows:

No. 3545.

WILLIAM W. BLACK, LIBELLANT, APPELLANT,

v.

HANS ANDREASEN, CLAIMANT OF VESSEL AND CARGO,

AND

BRADFORD DARRACH, CLAIMANT OF CARGO,

APPELLEES.

No. 3546.

HANS ANDREASEN, CLAIMANT OF VESSEL AND CARGO,

APPELLANT,

v.

WILLIAM W. BLACK, LIBELLANT,

AND

BRADFORD DARRACH, CLAIMANT OF CARGO,

APPELLEES.

No. 3547.

HANS ANDREASEN, CLAIMANT, APPELLANT,

v.

JAMES E. WARD ET AL., LIBELLANTS, APPELLEES.

No. 3548.

HANS ANDREASEN, LIBELLANT, APPELLANT,

v.

295,000 FEET OF LUMBER AND BRADFORD DARRACH ET AL.,

APPELLEES.

No. 3549.

BANQUE DE GÊNES, LIBELLANT, APPELLANT,

v.

HANS ANDREASEN, CLAIMANT, APPELLEE.

No. 3550.

HANS ANDREASEN, CLAIMANT, APPELLANT,

v.

BANQUE DE GÊNES, LIBELLANT, APPELLEE.

The Transcripts of Records of the District Court in the above-entitled causes are as follows:

[MEMORANDUM. The Transcript of Record of the District Court, as printed in this Transcript of Record in causes Nos. 3545 and 3546, commencing on page 1, Volume I., is here inserted.

The Transcript of Record of the District Court, as printed in this Transcript of Record in cause No. 3547, commencing on page 113, Volume I., is here inserted.

The Transcript of Record of the District Court, as printed in this Transcript of Record in cause No. 3548, commencing on page 129, Volume I., is here inserted.

The Transcript of Record of the District Court, as printed in this Transcript of Record in causes Nos. 3549 and 3550, commencing on page 145, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

These several causes were thence continued from term to term to the October Term, A. D. 1893, when the same were set down for hearing and fully heard by the Court, the Honorable William L. Putnam, Circuit Judge, sitting.

On the third day of April, A. D. 1894, the Opinion of the Court was announced and the following Order of Court entered: —

ORDER OF COURT.

APRIL 3, 1894.

Ordered: In each of numbers 3546, 3547, 3548, 3549 and 3550, be entered an order that the cause is consolidated with *The Eliza Lines*, No. 3545, according to the terms of the order this day entered in said last named case.

Ordered: In number 3545, be entered an order that *The Eliza Lines*, number 3546, *Cargo ex The Eliza Lines*, number 3547, *Andreasen* v. *295,000 Feet of Lumber and Darrach et al.*, number 3548, *The Eliza Lines*, number 3549, *The Eliza Lines*, number 3550, are consolidated with this case, and this case will be re-entitled *The Eliza Lines, her Cargo and Freight*, and with the other cases named will hereafter proceed, be disposed of and recorded as one cause only; and that the cause, number 3545, as consolidated, is referred to ....., commissioner, who shall hear the parties, and make the adjustments and findings required in the opinion filed this day, and on the principles therein set out, and

make report thereof; and the said commissioner shall receive for his only commission a certified copy of this order and of said opinion; and on the coming in and confirmation of such report, a final decree shall be entered in accordance with such opinion and this order.

This cause was thence continued to the May Term, A. D. 1894, when the following Suggestion of the Death of William W. Black was filed: —

SUGGESTION OF THE DEATH OF WILLIAM W. BLACK.

[Filed June 20, 1894.]

Catharine T. Black, of Brooklyn, in the Eastern District of New York, respectfully represents to this Honorable Court as follows:

That William W. Black, one of the parties to the action above named, died on April 27, 1892;

That she, the said Catharine T. Black, is the widow of said William W. Black, and was on November 3, 1892, duly appointed sole administratrix of his estate.

Wherefore she prays that she may be admitted as a party in said action, in the place of said William W. Black.

CATHARINE T. BLACK, *Administratrix*,
by Edward S. Dodge, *her Attorney*.

This cause was thence continued from term to term to the October Term, A. D. 1898, when the following Report of the Commissioner and Evidence Returned with Report was filed: —

REPORT OF COMMISSIONER AND EVIDENCE RETURNED WITH REPORT.

[Filed May 12, 1899.]

[Memorandum. The Report of Commissioner and Evidence Returned with Report, as printed in this Transcript of Record, commencing on page 237, Volume I., is here inserted. Alex. H. Trowbridge, *Clerk*.]

This cause was thence continued to the May Term of this Court, A. D. 1899, when the following Exceptions of Owners of Cargo and of James E. Ward & Company to the Commissioner's Report and Supplemental Report was filed: —

EXCEPTIONS OF THE OWNERS OF CARGO AND OF JAMES E. WARD & COMPANY TO THE COMMISSIONER'S REPORT AND SUPPLEMENTAL REPORT.

[FILED JUNE 10, 1899.]

[MEMORANDUM. The Exceptions of the Owners of Cargo and of James E. Ward & Company to the Commissioner's Report and Supplemental Report, as printed in this Transcript of Record, commencing on page 343, Volume I., is here inserted. ALEX. H. TROWBRIDGE, *Clerk*.]

This cause was thence continued to the October Term, A. D. 1899, when the same was set down for hearing and fully heard by the Court upon the Exceptions of the Owners of Cargo and of James E. Ward & Company to the Commissioner's Report and Supplemental Report, the Honorable William L. Putnam, Circuit Judge, sitting as aforesaid.

On the twentieth day of April, A. D. 1900, the Opinion of the Court was announced and the following Order of Court entered: —

ORDER OF COURT.

APRIL 20, 1900.

The appellants will, on or before May 1, file a draft decree in accordance with our prior opinion, as supplemented by this opinion, and James E. Ward & Company may file corrections thereof on or before May 10.

This cause was thence continued to the present May Term, A. D. 1900, when, on the twenty-sixth day of September, A. D. 1900, the following Final Decree is entered: —

FINAL DECREE.

SEPTEMBER 26, 1900.

And now, on the eighth day of November, 1893, the following causes, viz: —

No. 3545.

WILLIAM W. BLACK, LIBELLANT, APPELLANT,

v.

HANS ANDREASEN, CLAIMANT OF VESSEL AND CARGO,

AND

BRADFORD DARRACH, CLAIMANT OF CARGO,

APPELLEES.

No. 3546.

HANS ANDREASEN, CLAIMANT OF VESSEL AND CARGO,

APPELLANT,

v.

WILLIAM W. BLACK, LIBELLANT,

AND

BRADFORD DARRACH, CLAIMANT OF CARGO,

APPELLEES.

No. 3547.

HANS ANDREASEN, CLAIMANT, APPELLANT,

v.

JAMES E. WARD ET AL., LIBELLANTS, APPELLEES.

No. 3548.

HANS ANDREASEN, LIBELLANT, APPELLANT,

v.

295,000 FEET OF LUMBER AND BRADFORD DARRACH ET AL.,

APPELLEES.

No. 3549.

BANQUE DE GÊNES, LIBELLANT, APPELLANT,

v.

HANS ANDREASEN, CLAIMANT, APPELLEE.

No. 3550.

HANS ANDREASEN, CLAIMANT, APPELLANT,

v.

BANQE DE GÊNES, LIBELLANT, APPELLEE.

---

came on to be heard on the pleadings and proofs, and briefs and arguments of counsel for the several parties, and due deliberations having been had, it was, on the third day of April, 1894, ordered, adjudged and decreed that the several decrees of the District Court be modified; and it was further ordered that the above named causes, viz: Nos. 3546, 3547, 3548, 3549 and 3550, be each consolidated with the above named case, No. 3545, according to the terms of the

order entered on said third day of April, 1894, in said case, No. 3545; and, also, on said third day of April, 1894, it was orderd that in said case, No. 3545, an order be entered that the aforesaid causes, above named, viz: Nos. 3546, 3547, 3548, 3549 and 3550, be consolidated with said case, No. 3545, and that said case, No. 3545, be re-entitled "The Eliza Lines, her cargo and freight", and with the other cases named hereafter proceed, be disposed of and recorded as one cause only; and that the cause, No. 3545, as consolidated, be referred to a commissioner who should hear the parties, and make the adjustments and findings required in the opinion filed on said third day of April, 1894, and on the principles therein set out, and make report thereof; and that the said commissioner should receive for his only commission a certified copy of this said order, and of said opinion; and on the coming in and confirmation of such report, a final decree should be entered in accordance with such opinion and this order.

And thereupon said causes above named were consolidated.

And thereafter, to wit, upon the twelfth day of June, 1894, John D. Bryant, Esq., was appointed by the Court, Commissioner as aforesaid. And said Commissioner did, on May 12, 1899, report to the Court, and did make the adjustments and findings, as required in the opinion aforesaid.

And thereafter, to wit, on the twentieth day of April, 1900, exceptions to the report of said Commissioner having been duly heard and argued, the Court overruled the exceptions to the report of said Commissioner, and said report was confirmed.

And, thereupon, on this twenty-sixth day of September, 1900, the Court doth order, adjudge and decree as follows, viz: —

First. That the libellant, Catharine T. Black, of Brooklyn, in the Eastern District of New York, as she is administratrix of the estate of said William W. Black, deceased, in behalf of herself and the other part owners of the schooner Edward E. Barrett, recover as follows, viz: —

(*a*) against said bark Eliza Lines, and her owners, the sum of one thousand two hundred and forty-nine dollars and thirty-two cents ($1249.32), for proportion of salvage services and expenses, and the sum of two hundred and twenty-two dollars and eighty-five

cents ($222.85), proportion of costs of court, decreed by the District Court; in all, the sum of one thousand four hundred and seventy-two dollars and seventeen cents ($1472.17);

(*b*) against the cargo of said bark Eliza Lines, as represented by the net proceeds arising from the sale thereof, and now in the registry of the court, the sum of five hundred and ninety-five dollars and eighty-nine cents ($595.89), being the aggregate of the sum of five hundred and five dollars and sixty-eight cents ($505.68), for proportion of salvage services and expenses, and the sum of ninety dollars and twenty-one cents ($90.21), proportion of costs of court, decreed by the District Court, and therein apportioned against freight;

(*c*) against James E. Ward, Henry P. Booth and William H. T. Hughes, now or formerly copartners, doing business in New York, in the county and State of New York, under the firm name and style of James E. Ward & Company, the sum of nine hundred and ninety-six dollars and thirty-three cents ($996.33), due from them on account of freight and general average, together with eighty-two dollars and two cents ($82.02), interest thereon from May 12, 1899, the date of the Commissioner's Report, to September 26, 1900, the date of this decree; in all, the sum of one thousand and seventy-eight dollars and thirty-five cents ($1078.35), together with three hundred and seventy-four dollars and thirty-seven cents ($374.37), the actual taxable disbursements of said Black on this appeal.

And It is further ordered that summary judgments be, and the same hereby are, entered in favor of said Catharine T. Black, administratrix, libellant, against Hans Andreasen, of Farsund, Norway, claimant, the principal in the stipulation to the action given in the suit of *William W. Black* v. *The Norwegian Bark Eliza Lines, etc.*, in the District Court, — afterwards Nos. 3545, 3546, aforesaid, in this court, — for the release of said bark Eliza Lines, her boats, etc., and against Charles S. Gill and Gjert Lootz, both of Boston, in said District of Massachusetts, the sureties in said stipulation, for the aforesaid sum of one thousand two hundred and forty-nine dollars and thirty-two cents ($1249.32).

And against said Hans Andreasen, the principal in one of the stipulations for costs given in said case, and against the said Charles

S. Gill and Gjert Lootz, the sureties in said stipulation, for the sum of two hundred dollars ($200), — the amount of said stipulation.

And against Bradford Darrach, of New York, in the District of New York, the principal in the other stipulation for costs given in said case, and against William S. Spaulding and G. Winthrop Coffin, both of said Boston, the sureties in said stipulation, for the sum of two hundred dollars ($200), — the amount of said stipulation.

And It is further ordered that, if no appeal be taken from this decree within the time allowed by law, or by order of Court, the said libellant, Catharine T. Black, administratrix, have executions against the aforesaid principals and sureties, respectively, upon their respective stipulations; and against the aforesaid Hans Andreasen, claimant, for the sum of twenty-two dollars and eighty-five cents ($22.85), excess of costs of court decreed against said bark Eliza Lines, etc., by the District Court, over the amount of the aforesaid stipulation for costs by said Andreasen, and against said James E. Ward, Henry P. Booth, and William H. T. Hughes, now or formerly copartners as aforesaid, for the sum of one hundred and seventy-four dollars and thirty-seven cents ($174.37), excess of costs of court decreed against them by this Court, over the amount of the aforesaid stipulation for costs by said Darrach.

Second. That the libellant, the Banque de Gênes, of Genoa, Italy, recover against said bark Eliza Lines, and her freight, including average payable by the cargo to each, one thousand four hundred and fifty-eight dollars ($1458), together with nine hundred and forty-five dollars and three cents ($945.03), interest thereon from December 7, 1889, the date of the libel of said Banque de Gênes, to September 26, 1900, the date of this decree; in all, the sum of two thousand four hundred and three dollars and three cents ($2403.03), to be recovered from the respective parties, or interests, and in the sums and manner as follows, viz: —

(*a*) against said bark Eliza Lines, and her owners the sum of seven hundred and seventy-seven dollars and eighty-three cents ($777.83);

(*b*) against the freight of said bark Eliza Lines, as represented by the balance of the net proceeds of the cargo in the registry of the Court, after the deduction of the proportion of salvage services and

expenses, and costs, as provided above, in section first (*b*) of this decree, the sum of three hundred and fourteen dollars and eighty-five cents ($314.85);

(*c*) against whatever sum shall be realized from James E. Ward & Company as hereinafter provided in section fifth of this decree, the sum of one thousand three hundred and ten dollars and thirty-five cents ($1310.35), — the balance of the aforesaid sum of two thousand four hundred and three dollars and three cents ($2,403.03);

(*d*) against Hans Andreason, of Farsund, in the Kingdom of Norway, the sum of forty-two dollars and sixty cents ($42.60), costs taxed in its favor in the District Court, together with the sum of eighty-nine dollars and thirteen cents ($89.13), costs taxed in its favor in this court; in all, the sum of one hundred and thirty-one dollars and seventy-three cents ($131.73).

And It is further ordered that summary judgments be, and the same hereby are, entered in favor of said Banque de Gênes, of Genoa, Italy, libellant, against Hans Andreasen, of Farsund, in the Kingdom of Norway, claimant, principal in the stipulation to the action given in the suit of the *Banque de Gênes* v. *The Bark Eliza Lines, etc.*, in the District Court, — afterwards Nos. 3549, 3550, aforesaid, in this court, — for the release of said bark Eliza Lines, her tackle, etc., and against Charles S. Gill and Gjert Lootz, both of Boston, in said District of Massachusetts, the sureties in said stipulation, for the aforesaid sum of seven hundred and seventy-seven dollars and eighty-three cents ($777.83).

And against said Hans Andreasen, the principal in the stipulation for costs given in said case, and against said Charles S. Gill and Gjert Lootz, the sureties in said stipulation, for the aforesaid sum of one hundred and thirty-one dollars and seventy-three cents ($131.73), costs taxed in the District Court and in this court.

And It is further ordered that, if no appeal be taken from this decree within the time allowed by law, or by order of Court, the said libellant, the Banque de Gênes, of Genoa, Italy, have executions against the aforesaid principal and sureties respectively, upon the respective stipulations aforesaid.

Third. That Hans Andreasen, of Farsund, in the Kingdom of

Norway, libellant and claimant, in behalf of himself and the owners of said bark Eliza Lines, recover as follows, viz: —

(*a*) whatever balance may remain of the amount realized from James E. Ward & Company, as hereinafter provided in section fifth of this decree, after payment of the salvors, as hereinbefore provided in section first (*c*) of this decree, and further, after payment of the Banque de Gênes, of Genoa, as hereinbefore provided in section second (*c*) of this decree;

(*b*) against the aforesaid James E. Ward, Henry P. Booth and William H. T. Hughes, now or formerly copartners doing business in the city of New York, in the State of New York, under the firm name and style of James E. Ward & Company, the sum of seventy-three dollars and eighty-four cents ($73.84), costs taxed in favor of said Hans Andreasen, in the District Court, together with the sum of one thousand two hundred and fifty-three dollars and seventy-nine cents ($1253.79), costs taxed in its favor in this court; in all, the sum of one thousand three hundred and twenty-seven dollars and sixty-three cents ($1327.63).

And it is further ordered that, if no appeal be taken from this decree within the time allowed by law, or by order of Court, the said Hans Andreasen have execution against said James E. Ward, Henry P. Booth and William H. T. Hughes, now or formerly copartners as aforesaid, for the said sum of one thousand three hundred and twenty-seven dollars and sixty-three cents ($1327.63).

Fourth. That Bradford Darrach be dismissed from the cause, excepting as hereinbefore provided in section first of this decree, and that the said Darrach recover against the aforesaid Hans Andreasen the sum of ten dollars ($10), being one half of the costs of appeal taxed in his favor, and against said Catharine T. Black, as she is administratrix, as aforesaid, the sum of ten dollars ($10), being one half of said costs of appeal.

Fifth. That the Banque de Gênes, of Genoa, Italy, aforesaid, and Hans Andreasen, of Farsund, in the Kingdom of Norway aforesaid, recover against the aforesaid James E. Ward, Henry P. Booth and William H. T. Hughes, now or formerly copartners doing business in the city of New York, in the State of New York, under the firm name and style of James E. Ward & Company, the sum of

five hundred and eighty-eight dollars and ninety six cents ($588.96), for net balance of freight and general average, together with three hundred and eighty-six dollars and fifty-six cents ($386.56), interest thereon from October 18, 1889, the date of the motion for the sale of said cargo, to September 26, 1900, the date of this decree; in all, the sum of nine hundred and seventy-five dollars and fifty-two cents ($975.52); the decree, however, in favor of the Banque de Gênes, heretofore provided in section second (*c*) of this decree, against whatever sum shall be realized from said James E. Ward & Company, to be satisfied in full from said sum of nine hundred and seventy-five dollars and fifty-two cents ($975.52), before the satisfaction of any part of the decree in favor of said Hans Andreasen, heretofore provided in section third (*a*) of this decree.

And it is further ordered that, if no appeal be taken from this decree within the time allowed by law, or by order of Court, the said Banque de Gênes, of Genoa, Italy, and the said Hans Andreasen have execution against the said James E. Ward, Henry P. Booth and William H. T. Hughes, now or formerly copartners as aforesaid, for the said sum of nine hundred and seventy-five dollars and fifty-two cents ($975.52).

And it is further ordered that this portion of this decree, as well, also, as any and all of the preceding portions of this decree, against the aforesaid James E. Ward, Henry P. Booth and William H. T. Hughes, now or formerly copartners doing business in the city of New York, in the State of New York, under the firm name and style of James E. Ward & Company, may be enforced inside or outside of this district, wherever the persons of the said James E. Ward, Henry P. Booth and William H. T. Hughes, or either of them, or the goods, effects, credits, chattels or estate of them, or either of them, may be found; and the amount thus recovered may be distributed among the parties in interest, — viz, to the Banque de Gênes, and to the said Hans Andreasen, — without being paid into the registry of this court; and accordingly, each Court of Admiralty, wherever having jurisdiction, is requested, in furtherance of justice, to summarily execute this decree, being assured that the Courts of Admiralty in this jurisdiction will be ready and willing to do the like in similar cases when required.

Sixth. That all matters and things in said cause be and remain as decreed by the District Court except as in the opinion of this Court, in said cause, and in this decree, provided for or modified.

By the Court,

BENJ. H. BRADLEE, *Deputy Clerk.*

On the fourth day of December, A. D. 1900, Frederic Cunningham, Esq., proctor for James E. Ward & Company, suggests the death of James E. Ward on the twenty-third day of June, A. D. 1894, and the death of William H. T. Hughes, on the eighteenth day of June, A. D. 1900.

From the above decree, the following parties, viz, James E. Ward & Company, Catharine T. Black, administratrix, the Banque de Gênes and Hans Andreasen, claim an appeal to the United States Circuit Court of Appeals for the First Circuit, and give good and sufficient security that they will prosecute their appeals to effect, and answer all damages and costs if they fail to make their pleas good, and said appeal is allowed.

A true record:

Attest: ALEX H. TROWBRIDGE, *Clerk.*

[MEMORANDUM. The Opinion of the Circuit Court, announced on the third day of April, 1894, which is inserted here in the original Transcript of Record, is bound in, in Volume I., as pages 173 to 211, and the Opinion of the Circuit Court, announced on the twentieth day of April, 1900, which is inserted here in the original Transcript of Record, is bound in, in Volume I., as pages 349 to 359. JOHN G. STETSON, *Clerk.*]

PRAYER FOR APPEAL AND ASSIGNMENT OF ERRORS BY HENRY P. BOOTH, SURVIVING PARTNER OF JAMES E. WARD & COMPANY.

[FILED DECEMBER 4, 1900.]

PRAYER FOR APPEAL.

And now a final decree having been made and entered by this Honorable Court in the above-entitled cause, Henry P. Booth, surviving partner of James E. Ward, Henry P. Booth and William H. T. Hughes, formerly doing business in New York under the firm

name and style of James E. Ward & Company, being aggrieved by said decree, comes and appeals in his own behalf and in behalf of his said firm from said decree, and also from each and all of the several interlocutory orders and decrees heretofore made in said cause in this court, and prays that his said appeal may be allowed.

By their Proctors,

L. S. DABNEY,
F. CUNNINGHAM.

ASSIGNMENT OF ERRORS BY HENRY P. BOOTH, FOR HIMSELF AND FOR JAMES E. WARD & COMPANY.

1. That said Court erred in not affirming the decree of the District Court in No. 3545 and No. 3546, *The Eliza Lines.*

2. That said Court erred in not affirming the decree of the District Court dismissing the libel as of November 19, A. D. 1889, in No. 3547, *Cargo ex The Eliza Lines*, and in ordering said cause No. 3547 to be consolidated with No. 3545, *The Eliza Lines.*

3. That the Court has no power to consolidate the said cause with the others above named, because the said appellants have dismissed on their own motion the libel in said cause, and the said cause is no longer pending.

4. That said Court erred in not affirming the decree of the District Court dismissing, as against Bradford Darrach and James E. Ward & Company, the libel in No. 3548, *Andreasen* v. *295,000 Feet of Lumber and Darrach et al.*, and in ordering said cause No. 3548 to be consolidated with No. 3545, *The Eliza Lines.*

5. That the Court has no power to consolidate the said cause with the others above named, because no sufficient service has been made upon the said James E. Ward, Henry P. Booth and William H. T. Hughes.

6. That said Court erred in not affirming the decrees of the District Court in No. 3549, *The Eliza Lines*, and in No. 3550, *The Eliza Lines*, and in ordering the same to be consolidated with No. 3545, *The Eliza Lines.*

7. That said Court erred in striking from the record as unimportant the amendment of claim for cargo filed by Bradford Darrach November 26, 1889, substituting the said Atlantic Mutual Insurance

Company for said James E. Ward & Company as the claimant of said cargo, and praying that said claim might stand as the claim of said Atlantic Mutual Insurance Company, which amendment was allowed in the District Court on the twenty-seventh day of said November, and in not affirming the allowance of said amendment.

8. That said Court erred in holding the claim for cargo filed in court September 27, A. D. 1889, by Bradford Darrach on behalf of said James E. Ward & Company, upon oath, under Admiralty Rule No. 26, with a stipulation for costs and expenses upon putting in of the same as required by said Rule No. 26, to be an intervention under Admiralty Rule No. 34, and in treating the same as an intervention under said Rule No. 34.

9. That said Court erred in holding the petition that freight money be paid into court under Admiralty Rule No 38, filed November 27, A. D. 1889, by William W. Black, to be an intervening petition and in treating the same as an intervening petition.

10. That said Court erred in holding the libel filed November 27, A. D. 1899, by Hans Andreasen in No. 3548, *Andreasen* v. *295,000 Feet of Lumber and Darrach et al.*, to be a cross libel to the libel for salvage filed by Black September 26, A. D. 1889, in No. 3545, *The Eliza Lines* and in giving to the same the effect of such cross libel.

11. That said Court erred in holding the libel filed November 27, A.D. 1889, by Hans Andreasen in No. 3548, *Andreasen* v. *295,000 Feet of Lumber and Darrach et al.*, to be a cross libel to the libel for possession of the cargo of the Eliza Lines filed against said cargo October 18, A. D. 1889, by James E. Ward & Company in No. 3547, *Cargo ex The Eliza Lines*, and in giving to the same the effect of such cross libel.

12. That said Court erred in holding that the Court has jurisdiction to make any decree for the payment of money against said James E. Ward & Company.

13. That said Court erred in making a decree for the payment of money against said James E. Ward & Company in favor of William W. Black.

14. That said Court erred in making a decree for the payment of money against said James E. Ward & Company in favor of the Bank de Gênes and of Hans Andreasen.

15. That said Court erred in holding that said James E. Ward & Company are liable personally for the payment of freight, and in making a decree against them for the payment thereof.

16. That said Court erred in holding that said James E. Ward & Company are liable personally for the payment of general average, and in making a decree against them for the payment thereof.

17. That said Court erred in making a decree in favor of Catharine T. Black, administratrix, against said James E. Ward & Company for $996.33 on account of freight and general average, together with $82.02 interest, and $374.37 for the actual taxable disbursements of said Black on said appeal, and in entering summary judgment in favor of said Black, administratrix, against Bradford Darrach, William S. Spaulding and G. Winthrop Coffin for the sum of $200, being the amount of the stipulation entered into by them for costs.

18. That said Court erred in making a decree in favor of said Banque de Gênes against whatever sum shall be realized from said James E. Ward & Company for the sum of $1310.35.

19. That said Court erred in making a decree in favor of Hans Andreasen against said James E. Ward & Company for $1327.63 for costs..

20. That said Court erred in making a decree in favor of said Bank de Gênes and Hans Andreasen against the said James E. Ward & Company for $588.96, being net balance of freight and general average, with $386.56 interest thereon.

21. That said Court erred in ordering that the said decrees, as against said James E. Ward & Company, may be enforced outside of this District wherever the persons of the said James E. Ward, Henry B. Booth and William H. T. Hughes, or either of them, or the goods, effects, credits, chattels or estate of them, or either of them, may be found.

22. That said Court erred in holding that the libel of said James E. Ward & Company, No. 3547, *Cargo ex The Eliza Lines*, was pending in court November 27, 1889, when the libel of Hans Andreasen was filed, No. 3548, *Andreasen* v. *295,000 Feet of Lumber and Darrach et al.*, the decree of the District Court on said libel of said James E. Ward & Company having ordered the same to be dismissed, as of November 19, A. D. 1889.

23. That said Court erred in holding that the sale of said cargo was not a sale of necessity under Admiralty Rule No. 10.

24. That said Court erred in holding that said cargo was not perishable.

25. That said Court erred in holding that said sale must be held to have been made on the application of the owner of the cargo not for the common interest, but for his alone.

26. That said Court erred in finding that said sale was made without plea or proof or judicial decree.

27. That said Court erred in holding that said James E. Ward & Company or any owners of cargo had obtained possession of the proceeds of the sale thereof.

28. That said Court erred in holding that, said District Court having ordered a sale of the cargo upon the motion of said James E. Ward & Company, said James E. Ward & Company, although they had not obtained possession of any part of the proceeds of said sale, must stand the same consequences as if said cargo had been delivered to them, or as if they had received the proceeds of the sale thereof.

29. That said Court erred in holding, when said cargo had been sold under the order of the District Court, that claims for payment of freight and general average were not limited to the proceeds of such sale in the registry of the court, and in making a decree against said James E. Ward & Company for freight and general average in addition to said proceeds.

30. That said Court erred in not holding that the sale of the cargo under the order of the District Court was a breaking up of the voyage.

31. That the Court erred in not holding that the sale of cargo made under order of the District Court was made in the discretion of the Court rightfully exercised, and operated as a breaking up of the voyage, and that the order of sale so made could not be appealed from.

32. That said Court erred in holding that sufficient service of process had been made upon the libel of Hans Andreasen, No. 3548, *Andreasen* v. *295,000 Feet of Lumber and Darrach et. al.*, or upon the petition for payment of freight money into court filed by William W. Black, November 27, A. D. 1889, in No. 3545, *The Eliza Lines*, to give jurisdiction to the Court to make a personal decree against said James E. Ward & Company, or that the Court had in any way acquired jurisdiction to make such decree.

33. That said Court erred in holding that all claims for freight and general average were not under the charter to be confined to the cargo, and could be enforced by a personal decree against said James E. Ward & Company.

34. That said Court erred in holding that said James E. Ward & Company continued to be owners of said cargo after September 19, 1889, when said cargo was abandoned by said Ward & Company on that date to said Atlantic Mutual Insurance Company, the underwriters, which company accepted said abandonment and paid for a total loss.

35. That said Court erred in not holding that the abandonment or the ship and cargo at sea by the master and crew, in consequence of injuries sustained by an excepted peril, without any intention of returning and retaking them, thus leaving the same derelict upon the high seas, did entitle the owners of cargo to treat the contract of affreightment as abandoned and at an end.

36. That the Court erred in not holding that the abandonment of the ship and cargo at sea by the master and crew, in consequence of injuries sustained by an excepted peril, without any intention of returning and retaking them, thus leaving the same derelict upon the high seas, did have the effect of dissolving the contract of affreightment, so that the ship owner could not afterwards insist on being allowed against the will of the cargo owner to carry on the cargo to its destination, or vindicate any title to freight on the ground of such as offer.

37. That the Court erred in not holding that any right of the ship owner to carry on the cargo to its destination against the will of the cargo owner was confined and limited to such proportion only of said cargo as was not appropriated or necessary, for the compensation of the salvor.

38. That the Court erred in holding that after the abandonment of the ship and cargo at sea by the master and crew, in consequence of injuries sustained by an excepted peril, without any intention of returning and retaking them, thus leaving the same derelict upon the high seas, any right remained in the ship owner or master, against the will of the cargo owner, to carry on the cargo to its original destination.

39. That the Court erred in not holding that after the sale of the cargo by order of the District Court, the ship owners, claim for contribution in general average from cargo was limited and confined to the proceeds of the sale of cargo in the registry of the court.

40. That the Court erred in holding that in the eyes of the law the charterers James E. Ward & Company, without right, broke up the voyage at Boston, when they should have permitted the vessel to reload the cargo and deliver it at Montevideo or Buenos Ayres, according to the terms of the charter party, and that, therefore, the charterers were liable to make good in all respects as though the voyage had been completed.

41. That the Court erred in overruling and not sustaining the exceptions numbered from 1 to 5 inclusive, filed by owners of cargo and by James E. Ward & Company to the report and supplemental report of the Commissioner.

42. That the Court erred in overruling and not sustaining exceptions numbered 6 and 7, filed by the owners of cargo and by James E. Ward & Company to the report and supplemental report of the Commissioner.

43. That the Court erred in overruling and not sustaining exception numbered 8, filed by owners of cargo and by James E. Ward & Company to the report and supplemental report of the Commissioner.

44. That the Court, upon sustaining exceptions numbered 9, 10 and 11, filed by owners of cargo and by James E. Ward & Company to the report and supplemental report of the Commissioner erred in holding that the Commissioner had made an error in arriving at the net freight for the Lisbon voyage, and that the same balanced the error pointed out by said exceptions 9, 10 and 11.

45. That the Court, upon sustaining exceptions numbered 9, 10 and 11, filed by owners of cargo and by James E. Ward & Company to the report and supplemental report of the Commissioner, erred in not directing that the report and supplemental report be corrected accordingly, and in holding that the error pointed out in said exceptions was balanced by an error found by the Court to have been made by the Commissioner in arriving at the net freight of the Lisbon voyage in deducting from the gross freight one third thereof, when no ex-

ceptions or objection had been filed to the said method adopted by the Commissioner for arriving at the net freight, and the said owners of cargo and James E. Ward & Company had had no opportunity to be heard thereon, and in refusing thereupon to direct any correction in said report and supplemental report.

46. That the Court erred in overruling and not sustaining exceptions numbered 12 and 13, filed by owners of cargo and by James E. Ward & Company to the report and supplemental report of the Commissioner.

47. That the Court erred in overruling and not sustaining exception numbered 14, filed by owners of cargo and by James E. Ward & Company to the report and supplemental report of the Commissioner.

48. That the Court erred in overruling and not sustaining exceptions numbered 15 and 16, filed by owners of cargo and by James E. Ward & Company to the report and supplemental report of the Commissioner.

49. That the Court erred in overruling and not sustaining exception numbered 17, filed by owners of cargo and by James E. Ward & Company to the report and supplemental report of the Commissioner, so far as the same relates to charges amounting to $224.67 for commissions advancing and paying on general average.

50. That the Court on sustaining exception numbered 17, filed by owners of cargo and by James E. Ward & Company to the report and supplemental report of the Commissioner, so far as the same relates to the item of estimated charge for reloading cargo at Boston, $319, and declaring that on a correct adjustment the same should be deducted, erred in not directing that the report and supplemental report be corrected accordingly, and in holding that said error was more than offset by errors found by the Court to have been made by the Commissioner in estimating the contributory values of vessel and freight when no exceptions had been filed to the method adopted by the Commissioner in determining the contributory values of vessel and freight, and the said owners of cargo and James E. Ward & Company had had no opportunity to be heard thereon, and in refusing thereupon to direct any correction of said report and supplemental report.

51. That said Court erred in holding that the Commissioner had made errors in arriving at the contributory values of vessel and freight, and that the same would more than offset the error of the Commissioner pointed out in said exception numbered 17, in not deducting the said item of $319, which the Court held to be well taken.

52. That said Court erred in awarding to the salvors against said James E. Ward & Company the costs of appeal in No. 3545 taxed at $374 37, and in awarding execution against the principal and sureties in the stipulation for costs given by claimants of cargo in the sum of $200, and execution against said James E. Ward & Company for the balance of $174.37.

53. That said Court erred in awarding to Hans Andreasen against said James E. Ward & Company the costs of his appeal in No. 3546, $129.90, and in including the same in the sum for which execution is directed to issue against said James E. Ward & Company.

54. That said Court erred in awarding to said Hans Andreasen against said James E. Ward & Company costs taxed at thirteen hundred and twenty-seven dollars and sixty-three cents, and in ordering execution to issue for the same against said James E. Ward & Company in favor of said Hans Andreasen.

By their Proctors,

L. S. DABNEY,
F. CUNNINGHAM.

PRAYER FOR APPEAL AND ASSIGNMENT OF ERRORS BY BLACK, ADMINISTRATRIX.

[FILED DECEMBER 4, 1900.]

Catharine T. Black, Administratrix of the estate of William W. Black, libellant, appellant and appellee, in the case above named, being aggrieved by the decree, rulings and findings therein of the Circuit Court of the United States for the District of Massachusetts, claims an appeal from said decree, rulings and findings, and prays that her said appeal may be allowed.

And she hereby files with her Claim of Appeal the following Assignment of Errors.

By her Proctor,

EDWARD S. DODGE.

ASSIGNMENT OF ERRORS.

Said libellant, appellant and appellee assigns as errors in the decree, rulings and findings of the Court above appealed from:

First. That the Court should have awarded and decreed to her, said libellant, appellant and appellee, on behalf of the salvors, a greater sum, or greater sums, for salvage compensation.

Second. That the Court should have decreed that she, said libellant, appellant and appellee, should recover interest upon the sum or sums awarded to her, on behalf of the salvors, as salvage compensation.

Third. That the Court should have been ascertained the real value of the cargo of the bark Eliza Lines, at Boston, at the time when Darrach and Ward & Company procured said cargo to be sold at Boston, and should then have ordered Darrach, and Ward & Company, — either or both, — to pay into court such proportion of its real value as would satisfy the claims for salvage, freight and general average upon it, together with interest upon said claims; or should have required Darrach, and Ward & Company, — either or both, — to give a stipulation, with sureties, to pay such proportion into court when required by the final decree of the Court.

Fourth. That the Court should have ordered Darrach, and Ward & Company, — either or both, — to pay into court the full amount of the gross freight money for the carriage of the cargo of the Eliza Lines, or should have required them to give a stipulation, with sureties, to pay such freight money into court when required by the final decree of the Court.

Fifth. That the Court directed the Commissioner to credit to Ward & Company the proceeds of the cargo in the registry, or any part thereof, and that such proceeds have been so credited; and that the Court directed the Commissioner to apply such proceeds, or any part thereof, in any way, to freight, or general average, — either or both, — or any part thereof, and that such proceeds have been so applied.

Sixth. That the Court directed the Commissioner, in ascertaining the amount for which Ward & Company are to be held liable on account of freight and general average, "to deduct from the gross

freight such actual and theoretical charges as would be necessary to ascertain the net freight, in case the cargo had been reladen and the voyage completed"; and that said amount has been so ascertained upon the principles so laid down by the Court; whereas said Ward & Company should have been held answerable for the gross freight of the cargo of the Eliza Lines without any deductions therefrom.

Seventh. That the Court directed the Commissioner to deduct from the freight money due from Ward & Company the freight of the Eliza Lines to Lisbon, or any other freight earned by her, and that said freight of the Eliza Lines had been so deducted.

Eighth. That the Court directed the Commissioner to credit to Ward & Company freight's contribution to general average, and that such contribution has been so credited.

Ninth. That the Court did not decree that interest from the date of the sale of the cargo of the Eliza Lines should be added to any and all sums found due from Ward & Company.

Tenth. That the Court ordered and decreed that Bradford Darrach be dismissed from the cause, whereas said Darrach should have been retained in said cause, and the decree should have gone against him as well as against Ward & Company.

Eleventh. That the Court ordered and decreed costs to Bradford Darrach, whereas no costs should have been awarded to him.

By her Proctor,

EDWARD S. DODGE.

PRAYER FOR APPEAL AND ASSIGNMENT OF ERRORS BY THE BANQUE DE GÊNES.

[FILED DECEMBER 4, 1900.]

The Banque de Gênes, libellant, appellant and appellee, in the case above named, being aggrieved by the decree, rulings and findings therein of the Circuit Court of the United States for the District of Massachusetts, claims an appeal from said decree, rulings and findings, and prays that its said appeal may be allowed.

And it hereby files with its Claim of Appeal the following Assignment of Errors.

By its Proctor,

EDWARD S. DODGE.

ASSIGNMENT OF ERRORS.

Said libellant, appellant and appellee, assigns as errors in the decree, rulings and findings of the Court above appealed from:

First. That the Court should have ascertained the real value of the cargo of the bark Eliza Lines, at Boston, at the time when Darrach and Ward & Company procured said cargo to be sold at Boston, and should then have ordered Darrach, and Ward & Company, — either or both, — to pay into court such proportion of its real value as would satisfy the claims for salvage, freight and general average upon it, together with interest upon said claims; or should have required said Darrach, and Ward & Company, — either or both, — to give a stipulation, with sureties, to pay such proportion into court when required by the final decree of the Court.

Second. That the Court should have ordered Darrach, and Ward & Company, — either or both, — to pay into court the full amount of the gross freight money for the carriage of the cargo of the Eliza Lines, or should have required them to give a stipulation, with sureties, to pay such freight money into court when required by the final decree of the Court.

Third. That the Court directed the Commissioner to credit to Ward & Company the proceeds of the cargo in the registry, or any part thereof, and that such proceeds have been so credited; and that the Court directed the Commissioner to apply such proceeds, or any part thereof, in any way, to freight or general average, — either or both, — or any part thereof, and that such proceeds have been so applied.

Fourth. That the Court directed the Commissioner, in ascertaining the amount for which Ward & Company are to be held liable on account of freight and general average, "to deduct from the gross freight such actual and theoretical charges as would be necessary to ascertain the net freight, in case the cargo had been reladen and the voyage completed"; and that said amount has been so ascertained upon the principles so laid down by the Court; whereas said Ward & Company should have been held answerable for the gross freight of the cargo of the Eliza Lines without any deductions therefrom.

Fifth. That the Court directed the Commissioner to deduct from the freight money due from Ward & Company the freight of the Eliza Lines to Lisbon, or any other freight earned by her, and that said freight of the Eliza Lines has been so deducted.

Sixth. That the Court directed the Commissioner to credit to Ward & Company freight's contribution to general average, and that such contribution has been so credited.

Seventh. That the Court did not decree that interest from the date of the sale of the cargo of the Eliza Lines should be added to any and all sums found due from Ward & Company.

Eighth. That the Court ordered and decreed that Bradford Darrach be dismissed from the cause, whereas said Darrach should have been retained in said cause, and the decree should have gone against him as well as against Ward & Company.

By its Proctor,

EDWARD S. DODGE.

PRAYER FOR APPEAL AND ASSIGNMENT OF ERRORS BY HANS ANDREASEN.

[FILED DECEMBER 4, 1900.]

Hans Andreasen, claimant, appellant, libellant and appellee, in the case above named, being aggrieved by the decree, rulings and findings therein of the Circuit Court of the United States for the District of Massachusetts, claims an appeal from said decree, rulings and findings, and prays that his said appeal may be allowed.

And he hereby files with his Claim of Appeal the following Assignment of errors.

By his Proctors,

JOHN LOWELL,
JAMES A. LOWELL.

ASSIGNMENT OF ERRORS.

Said claimant, appellant, libellant and appellee, assigns as errors in the decree, rulings and findings of the Court above appealed from:

First. That the Court should have ascertained the real value of the cargo of the bark Eliza Lines, at Boston, at the time when Dar-

rach and Ward & Company procured said cargo to be sold at Boston, and should then have ordered Darrach, and Ward & Company, — either, or both, — to pay into court such proportion of its real value as would satisfy the claims for salvage, freight and general average upon it, together with interest upon said claims; or should have required said Darrach, and Ward & Company, — either or both, — to give a stipulation, with sureties, to pay such proportion into court when required by the final decree of the Court.

Second. That the Court should have ordered Darrach, and Ward & Company, — either or both, — to pay into court the full amount of the gross freight money for the carriage of the cargo of the Eliza Lines, or should have required them to give a stipulation, with sureties, to pay such freight money into court when required by the final decree of the Court.

Third. That the Court directed the Commissioner to credit to Ward & Company the proceeds of the cargo in the registry, or any part thereof, and that such proceeds have been so credited; and that the Court directed the Commissioner to apply such proceeds, or any part thereof, in any way, to freight or general average, — either, or both, — or any part thereof, and that such proceeds have been so applied.

Fourth. That the Court directed the Commissioner, in ascertaining the amount for which Ward & Company are to be held liable on account of freight and general average, "to deduct from the gross freight such actual and theoretical charges as would be necessary to ascertain the net freight, in case the cargo has been reladen and the voyage completed"; and that said amount has been so ascertained upon the principles so laid down by the Court; whereas said Ward & Company should have been held answerable for the gross freight of the cargo of the Eliza Lines without any deductions therefrom.

Fifth. That the Court directed the Commissioner to deduct from the freight money due from Ward & Company the freight of the Eliza Lines to Lisbon, or any other freight earned by her, and that said freight of the Eliza Lines has been so deducted.

Sixth. That the Court directed the Commissioner to credit to Ward & Company freight's contribution to general average, and that such contribution has been so credited.

Seventh. That the Court did not decree that interest from the date of the sale of the cargo of the Eliza Lines should be added to any and all sums found due from Ward & Company.

Eighth. That the Court ordered and decreed that Bradford Darrach be dismissed from the cause, whereas said Darrach should have been retained in said cause, and the decree should have gone against him as well as against Ward & Company.

Ninth. That the Court ordered and decreed costs to Bradford Darrach, whereas no costs should have been awarded to him.

Tenth. That the Court has disallowed the costs taxed by the clerk of said court in favor of this claimant, appellant, libellant and appellee, in the suit which was entitled before the consolidation ordered by the Court, No. 3547, *Hans Andreasen, Claimant, Appellant,* v. *James E. Ward et al., Libellants, Appellees.*

By his Proctors,

JOHN LOWELL,
JAMES A. LOWELL.

BOND TO PARTY ON APPEAL.

[FILED AND APPROVED, DECEMBER 5, 1900.]

Know all Men by these Presents, That we, Henry P. Booth, surviving partner of the firm of James E. Ward, Henry P. Booth and William H. T. Hughes, formerly doing business in the city of New York, in the Southern District of New York, under the firm name and style of James E. Ward & Company, as principal, and The Lawyers' Surety Company, of New York, as surety, are held and firmly bound unto Catharine T. Black, of said city of New York, Administratrix of William W. Black, and Hans Andreasen, of Farsund, in the Kingdom of Norway, and the Banque de Gênes, of Genoa, Italy, in the full and just sum of fifty-five hundred dollars, to be paid to the said Catharine T. Black, Administratrix, and Hans Andreasen and Banque de Gênes, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-sixth day of November, in the year of our Lord one thousand nine hundred.

Whereas, lately at a Circuit Court of the United States for the District of Massachusetts, in a suit in admiralty depending in said court, No. 368, and entitled "The Eliza Lines, Her Cargo and

Freight, Consolidated Cause", a decree was entered against the said James E. Ward, Henry P. Booth and William H. T. Hughes, copartners as aforesaid, and the said Booth, surviving partner as aforesaid, having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said Catharine T. Black, Administratrix, and Hans Andreasen and Banque de Gênes, citing and admonishing them to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the second day of January, A. D. 1901.

Now, the condition of the above obligation is such, that if the said appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then the above obligation to be void; else to remain in full force and virtue.

HENRY P. BOOTH, [SEAL]
THE LAWYERS' SURETY
COMPANY OF NEW YORK, [SEAL]
by WM. ROPESHAST.

Sealed and delivered in presence of
WALTER J. WHIPPLE *to* H. P. B.
GEO. W. BERRY *to* L. S. Co.

Approved: ROPES, GRAY & GORHAM.

Approved to operate as a supersedeas.
W. L. PUTNAM, *Circuit Judge.*

DECEMBER 5, 1900.

OBJECTIONS TO THE APPEAL BOND OF JAMES E. WARD & COMPANY.

[FILED AS OF DECEMBER 5, 1900.]

Objections of CATHARINE T. BLACK, *Administratrix of the estate of* WILLIAM W. BLACK, *Libellant, Appellant and Appellee;* HANS ANDREASEN, *Claimant, Appellant, Libellant and Appellee;* the BANQUE DE GÊNES, *Libellant, Appellant and Appellee, to the bond offered, on claiming appeal, by* HENRY P. BOOTH, *described in said bond as surviving partner of the firm of* JAMES E. WARD & COMPANY.

And now, on this fifth day of December, before approval of the bond offered on appeal by Henry P. Booth, described therein as sur-

viving partner of the firm of James E. Ward & Company, and before allowance of the appeal of said Booth, or of said Ward & Company, the above-named Catharine T. Black, Administratrix, Hans Andreason, the Banque de Gênes, object to said bond for the following reasons:

First. Because a separate bond should, on appeal, be given by said Booth, or by said James E. Ward & Company, to each of them, viz: to the said Catharine T. Black, Administratrix; to the said Hans Andreasen, and to the said Banque de Gênes; or, otherwise, said bond, on appeal, should be a several bond, or a joint and several bond, instead of merely a joint bond as is the bond now offered.

Second. Because said bond now offered is not in an amount sufficient for their indemnity; the more particularly as the said Ward & Company have not, heretofore, given to these objectors, or to any of them, any security, either in this court or in the District Court, either for costs or for damages, excepting only a stipulation for costs in the sum of $200, given on the twenty-seventh day of September, 1889, by Bradford Darrach, and of which said Black, Administratrix, alone can avail herself.

Third. Because the surety upon said bond is unknown to these objectors, and is not shown to be sufficient.

By their proctors,

EDWARD S. DODGE,
for CATHARINE T. BLACK, *Administratrix, Libellant, Appellant and Appellee.*

JOHN LOWELL,
JAMES A. LOWELL,
for HANS ANDREASEN,
Claimant, Appellant, Libellant and Appellee.

EDWARD S. DODGE,
for BANQUE DE GÊNES,
Libellant, Appellant and Appellee.

DECEMBER 5, 1900.

Disallowed.

W. L. PUTNAM, *Circuit Judge.*

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To CATHARINE T. BLACK, *Administratrix of the estate of* WILLIAM W. BLACK, *deceased, late of Brooklyn, in the Eastern District of New York,* HANS ANDREASEN, *of Farsund, in the Kingdom of Norway, and the* BANQUE DE GÊNES, *of Genoa, Italy, a banking corporation duly established by law,* GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the second day of January next, pursuant to an appeal duly obtained from a decree of the Circuit Court of the United States for the District of Massachusetts, wherein Henry P. Booth, surviving partner of James E. Ward, Henry P. Booth and William H. T. Hughes, formerly doing business in said New York under the firm name and style of James E. Ward & Company, is appellant, and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM L. PUTNAM, Judge of the Circuit Court of the United States for the District of Massachusetts, this fifth day of December, in the year of our Lord one thousand nine hundred.

WILLIAM L. PUTNAM,
U. S. Circuit Judge.

ACKNOWLEDGMENT OF SERVICE ON CITATION ON APPEAL.

Due and sufficient service of the within citation is hereby acknowledged.

JAMES A. LOWELL,
Proctor for HANS HANDREASEN.

EDWARD S. DODGE,
Proctor for BLACK, *Admx.*,
and the BANQUE DE GÊNES.

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To BRADFORD DARRACH, *of New York, in the State of New York, and* HENRY P. BOOTH, *surviving partner of* JAMES E. WARD, HENRY P. BOOTH *and* WILLIAM H. T. HUGHES, *formerly doing business in said New York under the firm name and style of* JAMES E. WARD & COMPANY, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the second day of January next,

pursuant to an appeal duly obtained from a decree of the Circuit Court of the United States for the District of Massachusetts, wherein Catharine T. Black, Administratrix of the estate of William W. Black, deceased, late of Brooklyn, in the Eastern District of New York, is appellant, and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM L. PUTNAM, Judge of the Circuit Court of the United States for the District of Massachusetts, this fifth day of December, in the year of our Lord one thousand nine hundred.

WILLIAM L. PUTNAM,
U. S. Circuit Judge.

ACKNOWLEDGMENT OF SERVICE ON CITATION ON APPEAL.

BOSTON, December 5, 1900.

Due and sufficient service of the within citation is hereby acknowledged.

FREDERIC CUNNINGHAM,
Proctor for Appellees.

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To BRADFORD DARRACH, *of New York, in the State of New York, and* HENRY P. BOOTH, *surviving partner of* JAMES E. WARD, HENY P. BOOTH *and* WILLIAM H. T. HUGHES, *formerly doing business in said New York under the firm name and style of* JAMES E. WARD & COMPANY, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the second day of January next, pursuant to an appeal duly obtained from a decree of the Circuit Court of the United States for the District of Massachusetts, wherein the Banque de Gênes of Genoa, Italy, a banking corporation duly established by law, is appellant, and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM L. PUTNAM, Judge of the Circuit Court of the United States for the District of Massachusetts, this fifth day of December, in the year of our Lord one thousand nine hundred.

WILLIAM L. PUTNAM,
U. S. Circuit Judge.

ACKNOWLEDGMENT OF SERVICE ON CITATION ON APPEAL.

BOSTON, December 5, 1900.

Due and sufficient service of the within citation is hereby acknowledged.

FREDERIC CUNNINGHAM,
Proctor for Appellees.

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To BRADFORD DARRACH, *of New York, in the State of New York, and* HENRY P. BOOTH, *surviving partner of* JAMES E. WARD, HENRY P. BOOTH and WILLIAM H. T. HUGHES, *formerly doing business in said New York, under the firm name and style of* JAMES E. WARD & COMPANY, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the second day of January next, pursuant to an appeal duly obtained from a decree of the Circuit Court of the United States for the District of Massachusetts, wherein Hans Andreasen, of Farsund, in the Kingdom of Norway, is appellant, and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM L. PUTNAM, Judge of the Circuit Court of the United States for the District of Massachusetts, this fifth day of December, in the year of our Lord one thousand nine hundred.

WILLIAM L. PUTNAM,
U. S. Circuit Judge.

ACKNOWLEDGMENT OF SERVICE ON CITATION ON APPEAL.

BOSTON, December 5, 1900.

Due and sufficient service of the within citation is hereby acknowledged.

FREDERIC CUNNINGHAM,
Proctor for Appellees.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, Alexander H. Trowbridge, clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in admiralty entitled,

No. 368, Consolidated Cause,

THE ELIZA LINES, HER CARGO AND FREIGHT,

in said Circuit Court determined, the Opinions of the Circuit Court of April 3, 1894, and April 20, 1900, the Prayers for Appeal and Assignments of Errors, the Bond to Party on Appeal and the Objections to the Bond of James E. Ward & Company, and also the original Citations issued upon the appeal of all parties in said cause, with the Acknowledgments of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this twelfth day of January, A. D. 1901.

[SEAL] ALEX. H. TROWBRIDGE, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1900.

THE ELIZA LINES, HER CARGO AND FREIGHT.

No. 368.

HENRY P. BOOTH, Appellant,

v.

CATHARINE T. BLACK, Administratrix, et al.

No. 369.

CATHARINE T. BLACK, Administratrix, Appellant,

v.

BRADFORD DARRACH et al.

No. 370.

BANQUE DE GÊNES, Appellant, *v.* BRADFORD DARRACH et al.

No. 371.

HANS ANDREASEN, Appellant, *v.* BRADFORD DARRACH et al.

TRANSCRIPT OF RECORD.

VOLUME III.

RECORD IN CIRCUIT COURT ON TAXATION OF COSTS.

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BOSTON:

PRINTED UNDER DIRECTION OF THE CLERK.

1901.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1900.

THE ELIZA LINES, HER CARGO AND FREIGHT.

No. 368.

HENRY P. BOOTH, APPELLANT,

v.

CATHARINE T. BLACK, ADM'X, ET AL.

No. 369.

CATHARINE T. BLACK, ADM'X, APPELLANT,

v.

BRADFORD DARRACH ET AL.

No. 370.

BANQUE DE GÊNES, APPELLANT,

v.

BRADFORD DARRACH ET AL.

No. 371.

HANS ANDREASEN, APPELLANT,

v.

BRADFORD DARRACH ET AL.

TRANSCRIPT OF RECORD OF CIRCUIT COURT, ON TAXATION OF COSTS.

[FILED IN CIRCUIT COURT OF APPEALS, MARCH 26, 1901.]

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on Tuesday, the fifteenth day of May, in the year of our Lord one thousand nine hundred.

Before

THE HONORABLE FRANCIS C. LOWELL, *District Judge.*

No. 368, CONSOLIDATED CAUSE.

THE ELIZA LINES, HER CARGO AND FREIGHT.

RECORD OF PROCEEDINGS ON TAXATIONS OF COSTS.

On the twelfth day of June, A. D. 1900, the following taxations of costs and clerk's report are filed:

TAXABLE DISBURSEMENTS OF BLACK AGAINST JAMES E. WARD & COMPANY.

Disbursements incurred in Circuit Court:

Copy record of District Court, 1/2		$18 93
Entry in Circuit Court		2 25
Printing record		93 22
Continuances		60
Printing brief		26 00
Taking depositions, — J. C. Miller	$6 50	
" " "	16 50	
		23 00
Copy opinion for Commissioner		38 00
Taking evidence before Commissioner		35 87
Printing Commissioner's report and objections		109 50
Printing brief, 1/2 costs		11 75
Clerk's fees, — 3545		15 25
		$374 37

CLERK'S REPORT ON FOREGOING TAXATION.

The only items objected to in the above taxation are the items for printing briefs. These I allow pursuant to the provision of paragraph 11 of Rule 23 of the rules of this court.

Respectfully submitted,

BENJ. H. BRADLEE, *Deputy Clerk.*

COSTS OF BANQUE DE GÊNES AGAINST ANDREASEN.

Costs in District Court		$42 60
Costs in Circuit Court:		
Copy transcript of record, 1/2		3 68
Entry in Circuit Court		2 25
Continuances		60
Printing record		18 35
Attorney fee, in cause		20 00
Printing brief		11 25
Copies of opinion		15 00
Clerk's fees, — 3549		18 00
		$131 73

JUNE 12, 1900. No objection to above taxation being made, the same is taxed as costs.

BENJ. H. BRADLEE, *Deputy Clerk.*

COSTS FOR ANDREASEN AGAINST JAMES E. WARD & COMPANY, EXCEPT SO FAR AS SUCH COSTS ARE AWARDED TO BLACK.

Costs in District Court		$73 84
Copy transcript of record		9 45
Entry three Appeals		6 75
Four Continuances		1 80
Attorney fee:		
In cause	20 00	
On six deps. at $2 50	15 00	
		35 00
Printing record — 3545 and 3546		93 47
" " — 3547		19 08
" " — 3548		19 89
" brief		8 75
" " Commissioner's report		11 75
" "		5 00
Clerk's fees — 3546		15 25
" " — 3547		14 50
" " — 3548		17 50
Witness fees before Commissioner		7 50
Attorney fee on two deps.		5 00
Commissioner's fees		1000 00
Copy record of District Court, 1/2		18 93
		$1363 46

CLERK'S REPORT ON TAXATION OF COSTS.

Counsel for James E. Ward & Company objects to any costs being taxed in cases originally numbered 3546 and 3547 on the ground that the decree of the District Court has not been modified by the Circuit Court in either of these cases. I allow these items for the reason that the opinion of the Court ordered a consolidation of all the various cases, and in that part of the opinion which awards costs to Andreasen it makes no distinction whatever between the various suits, ordering generally as follows: "third, in favor of Andreasen, in behalf of himself and the owners of the bark, for whatever balance may remain after payment of the salvors and the Banque De Gênes, and payable from the amounts realized from James E. Ward & Company as the same may be realized, and further for costs in this court and the court below against James E. Ward & Company, except so far as such costs are herein awarded to Black," (Opinion, page 210, lines 11–17.)

I do not consider that under the above order I have any discretion as to apportioning the costs to the various suits as originally brought, but that I must treat them all as one case and have taxed the costs accordingly.

Counsel for James E. Ward & Company objects to item of $8.75 for printing brief. I allow this as coming under the provisions of paragraph 11, Rule 23.

Respectfully submitted,

BENJ. H. BRADLEE, *Deputy Clerk.*

COSTS OF DARRACH, ONE HALF TO BE TAXED AGAINST ANDREASEN AND ONE HALF AGAINST BLACK.

Attorney fee $20.00

CLERK'S REPORT ON TAXATION OF COSTS.

The opinion orders "that Bradford Darrach be dismissed from the cause with costs of appeal in his favor, one half against Black and one half against Andreasen".

As Darrach appeared as agent of James E. Ward & Company only, the costs, if any, to which he is entitled is the above item

which I allow, against the objection of counsel for Andreasen and Black, for the reason that the court in their opinion evidently considered that Darrach was entitled to costs of some kind.

Respectfully submitted,

BENJ. H. BRADLEE, *Deputy Clerk.*

On the fourteenth day of June, A. D. 1900, the following Objections of James E. Ward *et al.* to Clerk's Taxation of Costs are filed: —

OBJECTIONS OF JAMES E. WARD ET AL. TO CLERK'S TAXATION OF COSTS.

[FILED JUNE 14, 1900.]

The said James E. Ward & Company object to the clerk's taxation of costs in this cause in favor of Hans Andreasen as follows:

1. Because the said clerk has included in his taxation in favor of said Hans Andreasen the costs of this court on appeal in No. 3546, Hans Andreasen, claimant, appellant, *v.* William W. Black, libellant, and Bradford Darrach, claimant of cargo, appellees. The items of taxation to which this objection applies are as follows:

Entry of one of the three appeals taxed . . .	$2 25
Printing record 3545 and 3546	93 47
Clerk's fees 3546	15 25
Copy of record District Court, one half . . .	18 93

2. Because said clerk has included in his taxation in favor of said Hans Andreasen the costs of this court on appeal in No. 3547, Hans Andreasen, claimant, appellant, *v.* James E. Ward *et al.*, libellants, appellees. The items of taxation to which this objection applies are as follows:

Entry of one of the three appeals taxed . . .	$2 25
Printing record 3547	19 08
Clerk's fees 3547	14 50
	$35 83

By their Proctors,

L. S. DABNEY.

F. CUNNINGHAM.

On the nineteenth day of June, A. D. 1900, the following Objections of Black and Andreasen to Taxation of Clerk in favor of Darrach are filed:

OBJECTIONS OF BLACK AND ANDREASEN TO THE CLERK'S TAXATION OF COSTS.

[FILED JUNE 19, 1900.]

The said Black and Andreasen object to the Clerk's taxation of costs in this cause in favor of Bradford Darrach as follows, viz:

Because the said Clerk has allowed in his taxation in favor of said Bradford Darrach the sum of $20, attorney fee.

By their Proctors,

EDWARD S. DODGE,
JOHN LOWELL,
JAMES A. LOWELL.

On the twenty-seventh day of June, A. D. 1900, after due consideration, the following Order of Court is entered: —

ORDER OF COURT.

JUNE 27, 1900.

Objections dismissed as to No. 3546 which covers controversy over the possession of the cargo.

Objection sustained as to No. 3547; appeal unnecessarily taken.

Objections of Black and Andreasen to Taxation in Favor of Darrach dismissed.

W. L. PUTNAM, *Circuit Judge.*

A true record:

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

I, Alexander H. Trowbridge, Clerk of the Circuit Court of the United States within and for the First Circuit and District of Massachusetts, certify that the foregoing is a true copy of the record and all proceedings on Taxations of Costs in the cause entitled,

No. 368, CONSOLIDATED CAUSE.

THE ELIZA LINES, HER CARGO AND FREIGHT,

determined in said Circuit Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court, at Boston, in said district, this twenty-sixth day of March, A. D. 1901.

[SEAL] ALEX. H. TROWBRIDGE, *Clerk.*

United States Circuit Court of Appeals

For the First Circuit.

OCTOBER TERM, 1900.

IN ADMIRALTY.

THE ELIZA LINES, HER CARGO AND FREIGHT.

No. 368.

HENRY P. BOOTH, APPELLANT,

v.

CATHARINE T. BLACK, ADMINISTRATRIX, ET AL.

No. 369.

CATHARINE T. BLACK, ADMINISTRATRIX, APPELLANT,

v.

BRADFORD DARRACH ET AL.

No. 370.

BANQUE DE GENES, APPELLANT,

v.

BRADFORD DARRACH ET AL.

No. 371.

HANS ANDREASEN, APPELLANT,

v.

BRADFORD DARRACH ET AL.

MOTION TO DISMISS THE APPEAL OF HENRY P. BOOTH, APPELLANT.

Catharine T. Black, Administratrix; The Banque de Gênes, of Genoa, Italy; and Hans Andreasen; Appellees in No. 368 and Appellants in Nos. 369, 370, 371, of the cases above named, now move

this Honorable Court that the appeal of Henry P. Booth, Appellant above named, be dismissed for the reason that the bond given on appeal by said Booth is not a good and sufficient security to them, and to each of them, for the following reasons, viz.:

1. Because a separate bond should, on appeal, have been given by said Booth to each of them, viz.: to the said Catharine T. Black, Administratrix; to the said Banque de Gênes; to the said Hans Andreasen, and also to the said Banque de Gênes and the said Hans Andreasen jointly and severally; or, otherwise, said bond, on appeal should have been so drawn and made as to run to each of them severally, or to them jointly and severally, instead of running to them jointly merely, as does the bond which has been given, and which has been approved by the Judge of the Circuit Court.

2. Because said bond given on appeal by said Booth is not in an amount sufficient for the indemnity of these appellees above named, and each of them.

By their Attorneys,

EDWARD S. DODGE,

Proctor for CATHARINE T. BLACK, *Administratrix, Appellee, and Appellant; and for the* BANQUE DE GENES, *Appellee, and Appellant.*

JOHN LOWELL,
JAMES A. LOWELL,

Proctors for HANS ANDREASEN, *Appellee, and Appellant.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1901.

THE ELIZA LINES, HER CARGO AND FREIGHT.

No. 368. HENRY P. BOOTH, APPELLANT,
v.
CATHARINE T. BLACK, ADM'X, ET AL.

No. 369. CATHARINE T. BLACK, ADM'X, APPELLANT,
v.
BRADFORD DARRACH ET AL.

No. 370. BANQUE DE GÊNES, APPELLANT,
v.
BRADFORD DARRACH ET AL.

No. 371. HANS ANDREASEN, APPELLANT,
v.
BRADFORD DARRACH ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE COLT, ALDRICH AND BROWN, JJ.

OPINION OF THE COURT.

FEBRUARY 13, 1902.

ALDRICH, J. We have taken time to carefully examine the cases consolidated under the title of *The Eliza Lines, her Cargo and Freight*, and our conclusion is that the Circuit Court, after a thorough and exhaustive examination of the details involved in the situation, and a comprehensive consideration of the

general principles of law which should govern the disposition of the several cases, disposed of them without substantial error.

A full narrative of the facts, and a sufficiently comprehensive history of the various proceedings grouped under the title of *The Eliza Lines*, will be found in the two opinions of the Circuit Court, and by referring thereto it becomes unnecessary for us to reiterate. *The Eliza Lines*, 61 Fed. Rep. 308; *The Eliza Lines*, 102 Fed. Rep. 184.

We do not feel called upon to discuss and we do not feel that justice requires that we should discuss seriatim the eighty or more assignments of error. The substantive rights of the various parties are principally involved in the question whether the involuntary abandonment of the vessel at sea, under the circumstances pointed out, operated to terminate the contract of affreightment, or whether, under principles governing in the admiralty law, the master of the vessel was entitled, within a reasonable time after the vessel was brought into port, to reclaim the cargo after discharging the liens and claims incident to its recovery. The solution of this question either way would render it unnecessary to examine many of the assignments of error set out in the record.

When these cases were brought to the Circuit Court, the cargo had been sold, and that court was confronted with the duty of dealing with the situation as presented,—of making ascertainments, adjusting the interests and liabilities of the various parties, and distributing the proceeds according to equity, under the guidance of such general principles of admiralty law as were applicable to the situation as it then existed; and, after finding the facts relative to the disaster at sea and the efforts of the master to reclaim the vessel and her cargo after arrival in port and before the sale of the cargo, the learned judge proceeded to an examination of the substantial question in the case, and the one upon which the rights of the parties largely depended, and, as a result, concluded that the involuntary abandonment at sea, under the circumstances, did not terminate the contract of affreightment, and that the master

should have been treated as entitled to proceed with the cargo upon proper stipulation. This result was reached after a most careful and painstaking examination of the English and American cases, and upon a line of reasoning which makes it clear that any other rule than the one adopted would be an unjust rule as applied to a situation like the one presented. *The Eliza Lines*, 61 Fed. Rep. 308; *The Eliza Lines*, 102 Fed. Rep. 184. It is not altogether clear that the English authorities establish the proposition that the owners of a cargo may, under an involuntary abandonment at sea like the one in question, and in the absence of an actual intention on the part of the shipowner to abandon the vessel, treat the contract of affreightment as absolutely at an end, and proceed to a sale of the cargo regardless of the prompt and reasonable efforts of the master to regain possession, regardless of the strong equity created by an actual earning of a large part of the freight covered by the contract, and regardless of the question whether the cargo is perishable or otherwise. If such a rule is deducible from the English authorities, it is abundantly demonstrated, by the reasoning of Judge Putnam in the Circuit Court, to be contrary to a natural sense of justice, and therefore one which we should not feel bound to follow in the absence of a Supreme Court decision to that effect, and none such is suggested.

It is apparent that the abandonment of the vessel was not voluntary, and that there was no actual renunciation of the contract by the ship-owners, neither was there in that respect any actual intention, one way or the other, involved in the abandonment. It is probably true that when, under stress of weather and circumstances, the master and crew were taken from her deck, they acted upon the idea that she was lost; but there was no wrongful intention, and probably no actual thought one way or the other upon either the question of the recovery of the vessel or the abandonment of property rights. Under such circumstances, the vessel was picked up by others, and, without any substantial change in her condition or that of her cargo, was brought into the port of Boston, and the

master made prompt and reasonable effort to regain possession of the property, which temporarily, but without his fault, had been put out of his control. The ship-owner, in no sense, from the beginning of the voyage from Pensacola to the time he asserted the right of repossession at Boston, had renounced the contract between himself and the cargo-owners. He had not agreed that the contract should be treated as off. No act of the cargo-owners contributed to the force which brought the vessel under control and into the port of Boston, and it is only a rule of plain and simple justice that, upon indemnity to the salvors and a proper stipulation, the master, under such circumstances, should be permitted to take charge of his vessel, and to carry its unperishable cargo to the stipulated port of destination.

The Arno (8 Asp. Mar. Cas. 5) and other English cases make the question turn largely upon the question of intention, and in *The Arno*, as well as in the American case, *The Elizabeth and Jane* (15 Fed. Cas. 478), the ship-owner had made no effort nor shown any intention to reclaim the property at the time the cargo-owners interposed. We are not dealing here with a situation where the carrier does not choose to stipulate, or where no intention is shown, nor reasonable effort made, to reclaim the property, and it is therefore unnecessary to examine into such a situation or state any rule with respect to the rights and obligations of the parties under such circumstances. After the vessel and cargo in question were brought into port the ship-owner speedily got possession of his vessel and made prompt and reasonable effort to regain possession of the cargo, and to discharge the obligations to the salvors, and go on with his voyage.

The just doctrine enunciated by Judge Putnam in *The Eliza Lines* has found its place in Carver's Carriage by Sea (3d ed., sections 308, 373*b*, 445, 554, 561, 651). The rigid rule of *The Kathleen* (L. R. 4 Ad. & Ec. 269), though the cargo was perishable, was strenuously assailed by counsel in the later case of *The Cito* (7 P. D. 5), and, while some features of *The Kathleen*

were sustained, the Appellate Court said, page 9, "We do not decide what would have been the result if, after the ship had been brought in as it was by the salvors, and before the cargo-owners had come and exercised their right to the cargo, the ship-owner had given bail for the ship and the cargo and had carried the cargo on." That at least amounts to a query as to the application of the doctrine of *The Kathleen* to a case like the one at bar. In *The Leptir* (5 Asp. Mar. Cas. 411), the doctrine of *The Cito* was questioned by the court, for it is there said, at page 412, "I do not intend to carry *The Cito* a step farther than it has gone"; and, under the circumstances of that case, the owner of the cargo was held liable for the freight. In referring to the rule of *The Kathleen* and *The Cito*, ~~Lord Tenterden, in his treatise on the Law of Merchant Ships and Seamen~~ it is observed (Abbott's Merchant Shipping, 13th ed. 456), observes that "the reasonableness of this decision is not clear", and in Wendt's Maritime Legislation (3d ed. 627, 629), the rule is assailed with vigor by the author, who, upon forcible reasoning, —which involves the idea that the rule gives the cargo-owner full option to take advantage of common misfortune for the purpose of evading a contract entered into by him, which, according to the law of every civilized country, holds good until both parties to it, of their own free will, agree that it shall not be carried on, and that an involuntary abandonment, or the action of the crew in leaving a vessel to save their lives, is not an expression of an agreement on the part of the owners of the vessel to cancel or abandon the contract, — proceeds to declare the rule as one "opposed to every principle of law and justice, * * * a doctrine utterly opposed to common sense".

We must confess our inability to contend against the idea expressed by this author that a rule which enables the cargo-owner to take advantage of such misfortune of the ship-owner is in violation of plain principles of law, and contrary to justice, and we assume that the necessity for this harsh rule in respect to derelict property on the ocean has ceased to exist. The spirit of modern law and present conditions of civilization will justify

a closer approximation to a rule of justice than the rule which, on the forced theory of renunciation, though in fact the abandonment was involuntary, deprived the carrier of compensation for the carrying benefit bestowed upon property put out of his possession without his fault, even though, upon recovery, the carrier made prompt and reasonable effort to discharge salvage claims and regain possession of the ship and cargo.

We think it is unnecessary to deal further with this question, and prefer to leave this branch of the case upon the critical analysis and the careful reasoning of the Circuit Court.

Now what was the effect of the sale of the cargo under order of court upon the rights of the various parties? It is sufficient for the purposes of this case to say, that under the circumstances disclosed by the record, the proceedings in the District Court and the sale of the cargo by order of that court did not determine and establish the ultimate rights of the parties consequent upon the alleged abandonment of the ship and cargo at sea.

The Circuit Court having determined these two questions according to views which we sustain, proceeded, under the general principles of the admiralty law, which, in a sense, adjusts itself to the necessities and contingencies of maritime affairs, to ascertain the rights and interests of the various parties, and to give directions for determining general average and net freight under the peculiar circumstances of these particular cases.

In view of this we are confronted by the claim that, as the master was without fault and had made prompt and reasonable effort to regain possession of the vessel and cargo when the vessel was brought to the port of Boston, and was entitled, upon proper stipulation, to take possession of the vessel and cargo, and proceed to the port of destination, which right was denied him, he should be accorded gross freight rather than the net freight awarded by the Circuit Court.

It must be borne in mind in this connection that the Circuit Court was not dealing with the question whether the ship-

owner should then be permitted to complete the voyage. The cargo had been sold by order of the District Court, and, although the breaking up of the voyage by the cargo-owners was not justifiable under the circumstances, the only thing the Circuit Court could do was to determine what the ship-owner should receive in damages by way of indemnity for being kept out of his rights. Should he, therefore, be accorded gross freight, or should there be deducted from the gross freight what it would cost to complete the voyage and what the vessel ought to earn in the time which would necessarily be occupied in carrying the voyage forward to the port of destination? The latter view would seem to be fair because it gives full indemnity. Gross freight would seem to be unfair because it would give more than indemnity. It would give the ship-owner the contract price without regard to the fact that it would have cost him something to reload the cargo, after making the necessary repairs, and continue the voyage. Considerations of equity which relieve the ship-owner who, without fault, has been forced from the deck of his vessel by the perils of the sea, from the rigid rule of absolutism which denies him the freight actually earned, would deny the ship-owner a rule of absolutism which would give him a larger measure of freight than the vessel was equitably entitled to receive. The spirit of equity which relieves a party upon the ground of misfortune from the hardship of a rigid rule consequent upon abandonment at sea would be offended by a rule which would accord to the party relieved a measure of damages beyond that which he has sustained or what is equitable. The voyage was temporarily interrupted by the perils of the sea, and permanently prevented by the fault of the cargo-owners, and the shipowner was accorded freight in the nature of damages, not by virtue of the strict terms of the unexecuted contract, but upon grounds of equity because non-performance was excusable, and notwithstanding the fact that the contract was unexecuted. The right to reclaim the ship and cargo after abandonment by discharging salvage claims, acting promptly and with

reasonable diligence, though further performance of the contract is prevented by the cargo-owners, does not necessarily restore the ship-owner to a position where he may insist upon recovery according to the strict terms of the contract, but to a position where he may receive what he is equitably entitled to for freight already earned, and what equity would accord to the vessel for the remainder of the voyage. It is because of equitable considerations that he is restored to any right of recovery after his property has remained derelict upon the open sea, and therefore his measure of damages should be an equitable measure. This manifestly would not be gross freight, for, as said, the voyage could not be taken up and continued without the burden of incidental and necessary expense, and if this burden is not sustained, full freight should not become the measure of recoverable damages; and the further suggestion is susceptible of proof in a given case that a ship might and should earn something in the time which would necessarily be occupied in carrying freight forward to the port of destination. As observed by the Circuit Court, if such beneficial results to the ship-owner were not taken into consideration, he would be more than indemnified, and an award of damages based upon full affreightment would operate to impose a penalty upon the cargo owners. Such would not be an equitable rule.

When the ship-owner, with his crew, was on the way to Halifax, and the disabled vessel, with her cargo, was adrift in mid-ocean, control was lost not through renunciation, but through disaster. Control had been wrested by the supreme powers of the ocean, yet the right of property remained. The owner did not renounce his right of property though the right of possession was temporarily gone (*The Bee*, 1 Ware, 332, 339), and if the unexpected should happen, and the lost property should be brought into a harbor of refuge, upon identification and discharge of such obligations as should be created in favor of strangers who found and saved it, the right of possession by the ship-owner would be re-established. It is in this sense that the right of the ship-owner remains, and it is upon this

ground that he is restored to possession upon indemnity to the independent though unexpected force which finds and brings under control the lost property.

Wrongful abandonment of a ship and cargo at sea, or actual renunciation of the right of possession, of course, amounts to a permanent breach of the contract of affreightment, and the right of the ship-owner to be repossessed of property abandoned under force of circumstances, and which remained at large upon the open sea until brought under control and into a port of refuge by the act of strangers, results under the elastic principles of the admiralty law because it is repugnant to equity and justice that the right under such circumstances should be wholly and permanently lost. The right of possession being thus restored upon grounds of equity, it logically and philosophically follows, we think, that the rule of damages should be an equitable rule, rather than an arbitrary one through a rule of law making the strict terms of the contract as to freight the measure of recovery. Therefore the rule adopted by the Circuit Court, in respect to the unearned part of the voyage, was sufficiently favorable to the ship-owner and that court was right in holding that no damages should be recovered in excess of the net injury suffered, and in proceeding to estimate this injury by deducting from the gross freight such charges as were saved to the vessel, and such amount as she was able to earn by the termination of the contract prior to the time contemplated. *Watts* v. *Camors*, 115 U. S. 353; *The Gazelle and Cargo*, 128 U. S. 474, 487.

It would seem that, under somewhat analogous conditions at law, the rule of damage is indemnity, or what the party has lost. *Bank of the United States* v. *Bank of Washington*, 6 Pet. 8, 19; *Northwestern Fuel Company* v. *Brock*, 139 U. S. 216, 220.

While Ward & Company have succeeded in pointing out certain minor errors in respect to details and to the method of computation, errors of that character may, rightfully enough we think, be treated as harmless upon the findings of the

Circuit Court that they were more than compensated by errors of computation in their favor. On the whole, in our opinion, the judgment is rather too favorable to Ward & Company than otherwise; and had one question now urged been based upon proper exceptions by the other appellants, it is probable that we should have been called upon to enhance rather than to diminish the judgment against Ward & Company upon the whole case. The position taken by the interests adverse to Ward & Company, that the liability of Ward & Company should not have been diminished by any deduction of freight's contribution to general average, at least presents a serious question. It is by no means clear, however, that the preliminary opinion of the Circuit Court justified the commissioner's mode of computation in his first report, or that the alternative report is so clearly correct that we can now adopt it; and on the whole we think that we cannot fairly go to the merits of this question, presented here in the appellate court for the first time. The report of a commissioner stands, and should stand, in respect to exceptions, like exceptions at a jury trial, where they should be taken at a time and under circumstances where error can be easily corrected if urged, and, if not urged, should be treated as waived. But, aside from the analogy of the practice as to exceptions upon a jury trial, under the eighty-third rule of practice in equity, parties have a given time in which to file exceptions to the report of a master, and if none are presented within that time, the report stands confirmed, or, in other words, exceptions are waived. Admiralty Rule 44 contemplates that proceedings before commissioners shall be under the rules which govern masters in chancery in equity proceedings; but, without regard to Rule 44, it would be assumed that practice in respect to a report of a commissioner in an admiralty proceeding would be in accordance with practice in equity, unless otherwise expressly regulated by the rules of admiralty. If the parties had intended to rely upon objections to computations by the commissioner, the objections and exceptions should have been distinctly stated upon

the coming in of the report, or at least upon the hearing before the Circuit Court, upon the question as to its acceptance, to the end that, if errors in computation were either apparent or could be discovered, the report should be recommitted for correction. This was not done, nor was any objection or exception in this regard taken to the regulations promulgated by the Circuit Court under which the master was to work out his results; and, so far as the record shows, no exceptions were taken by these parties to the computation upon the hearing before the Circuit Court. It is true a letter was appended to the commissioner's report in which the question is suggested; but as the point was not taken by the parties, the Circuit Court was warranted in viewing it as one which the parties did not desire to press. So far as we can see, this question was first raised upon the record by the assignment of errors, and such assignment in no way presented the question for the Circuit Court, but raised it here for the first time. We think, in all fairness to the parties, that this question should be treated as waived, because, as already said, if it had been taken upon the report of the commissioner, if found to be tenable, it could have been easily corrected by recommittal. While other parties filed various specific objections to the report, the parties now presenting this question did not file any exceptions to the report on the ground now urged, and, as a result, the cases have proceeded upon other lines for several years; and we think it would assuredly be unfair to the various interests, and to the court as well, to disturb the findings, the calculations, and the decrees, by allowing this question to be raised as an original question in this court at this late day. The error is not so manifestly apparent, and injustice on the whole case is not so clear as to require our interference with the computations in this case, in respect to a question raised as this question is.

The manifold assignments of error by the different parties under the various appeals are largely constructed upon the particular theory of each party as to the rights and obligations

resulting from the abandonment at sea and the subsequent salvage of vessel and cargo. Many of the alleged errors relate to matters of discretion, others to just and reasonable expedients necessitated by the peculiar and exceptional situation of these cases, others are pecuniarily inconsequential, while others are frivolous. Of these minor assignments of error, many of which may be said to be subsidiary to the particular view of the different parties in respect to the substantive right involved in the main contention relative to the effect of the abandonment of the vessel at sea, and their rights and interests thereunder, we only feel called upon to say that we are not satisfied that any of the details of the course adopted by the Circuit Court involved error which would justify this court in reversing its action; but, on the contrary, we are satisfied that the cases were disposed of, on the whole, with substantial justice to all interests.

It only remains, therefore, to deal with the questions relating to the consolidation of the various proceedings, and to the power and duty of the court in respect to the attitude which Darrach and Ward & Company sustained thereto.

The rights and interests of the various parties, by reason of their diverse claims in respect to the disaster at sea and in respect to the various proceedings relating thereto which were pending in the District and Circuit Courts, were involved in the intricacies of an inextricable legal tangle, and we have no doubt of the power of the Circuit Court to consolidate the proceedings in question, or of the wisdom of such action. Indeed, it is difficult to see that the controversy could have otherwise been adjusted without subjecting the parties and their interests to unwarrantable expense and interminable delay. There seems to be no limit upon the power of the court, in the exercise of a sound discretion, to consolidate different cases pending in the same court and relating to the same subject-matter where justice can be administered more speedily and less expensively through such consolidation, and the duty of the court to order such consolidation would seem to be plain when no individual interests will be prejudiced and when all interests will be bene-

ficially subserved by thus speeding an ultimate ascertainment and establishment of the several rights.

The court having jurisdiction of the subject matter in controversy, Ward & Company, through Bradford Darrach and others, submitted themselves to its jurisdiction, and having thus interposed for the purpose of having their rights relative to the subject-matter ascertained and established, and having for that purpose thus voluntarily attached themselves to and interrupted the course of the proceedings between other parties, they were in for all purposes, and the court unquestionably had power, not only to deal with the particular rights which Ward & Company asserted in their own behalf, but, upon proper incidental and auxiliary proceedings, to deal with all the rights and all the consequences which sprung from or naturally and reasonably followed their interruption of the further prosecution of the voyage and from their interposition in respect to the adjustment of the various rights. *Ward* v. *Todd*, 103 U. S. 327; *Ober* v. *Gallagher*, 93 U. S. 199.

It is of no consequence whether they were or were not strictly intervenors or cross libellants. They were in with their libel against the cargo *in rem* for possession, and with their claim in the salvage suit for a delivery of the cargo upon stipulation, while Andreasen, the master, also had his libel against the cargo and the owners of it for the payment of freight and general average. The subject-matter and the parties all being thus before the court, either upon personal notice or upon notice to their proctors of record, there is no known reason why the rights should not all be ascertained and established. Such course avoids circuity of action and multiplicity of process, and the modern rule of practice not only permits it, but convenience and justice require that it should be so.

Several of the parties, perhaps all, suffered by reason of the forced sale of the cargo in a disadvantageous port, and those other than the cargo-owners who have suffered by such sale urge that the award against the cargo-owners should be for the true value of the cargo rather than the net proceeds of the

sale thereof. There are strong reasons why the cargo-owners should be held for the value of the property. Their interference, even under the regular forms of maritime procedure, was unwarrantable and inexcusable under the circumstances. Such interference operated to interrupt a voyage which should and would otherwise have been completed. But the claim of the cargo-owners of their right to take possession of the cargo at the port of refuge and terminate the voyage was asserted through regular process which, under the rules and practice of admiralty, threw the property into the custody of the District Court, and the sale being a public sale upon order and in an open port, we have difficulty in finding grounds upon which to hold the cargo-owners for or on account of the cargo in a sum greater than the net proceeds of the sale, which was the basis adopted by the Circuit Court.

The rights of the parties were in litigation and the sale of the cargo was under the forms of law and upon the ascertained necessity of protecting the property, not because it was perishable, not because it was deteriorating in value, but in the sense of saving the absorbing expense incident to custody, and in the supposed interest of whatever party should establish the right to realize from it. And though the order of sale did not settle the ultimate and substantive rights of the parties, and though it worked an injustice, we do not see our way clear, under the circumstances, to hold the parties whose proceeding precipitated the sale, liable in respect to the cargo beyond the proceeds realized from the public sale under the forms of law and upon the order of the District Court, in whose custody the property then was.

On the whole, our conclusion is that the decree of the Circuit Court should be affirmed.

The decree of the Circuit Court is affirmed, without costs in this court to either of the parties.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1901.

Nos. 368, 369, 370 and 371.

THE ELIZA LINES, HER CARGO AND FREIGHT.

DECREE IN CIRCUIT COURT OF APPEALS.

FEBRUARY 13, 1902.

This cause came on to be heard on May 15 and 16, 1901, upon the Transcript of Record of the Circuit Court of the United States for the District of Massachusetts and upon the Motion of Catharine T. Black, Administratrix, the Banque de Gênes and Hans Andreasen, to dismiss the appeal of Henry P. Booth, and was argued by counsel.

On consideration whereof, it is now, to wit, February 13, 1902, here ordered, adjudged and decreed as follows: The decree of the Circuit Court is affirmed without costs in this court to either of the parties.

By the Court,

JOHN G. STETSON, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1901.

THE ELIZA LINES, HER CARGO AND FREIGHT.

No. 368.

HENRY P. BOOTH, APPELLANT,

v.

CATHARINE T. BLACK, ADM'X, ET AL.

No. 369.

CATHARINE T. BLACK, ADM'X, APPELLANT,

v.

BRADFORD DARRACH ET AL.

No. 370.

BANQUE DE GÊNES, APPELLANT,

v.

BRADFORD DARRACH ET AL.

No. 371.

HANS ANDREASEN, APPELLANT,

v.

BRADFORD DARRACH ET AL.

PETITION FOR REHEARING.

EDWARD S. DODGE,
JOHN LOWELL,
JAMES A. LOWELL,
Proctors for Petitioners.

BOSTON:
L. H. LANE, LAW PRINTER,
97 OLIVER STREET,
1902.

UNITED STATES CIRCUIT COURT OF APPEALS

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THE ELIZA LINES, HER CARGO AND FREIGHT.

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HENRY P. BOOTH, APPELLANT,

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v.

BRADFORD DARRACH ET AL.

No. 371.

HANS ANDREASEN, APPELLANT,

v.

BRADFORD DARRACH ET AL.

PETITION FOR REHEARING.

And now, a decision having been rendered in the above cases (consolidated under the title of *The Eliza Lines, her Cargo and Freight*) affirming the decree of the Circuit Court, without costs in this Court, to either of the parties, Catharine T. Black, Administratrix, Libellant, Appellant, and Appellee; Hans Andreasen, Libellant, Appellee, and Appellant; and the Banque de Gênes, Libellant, Appellant, and Appellee, respectfully ask this Court to grant a re-

hearing of this cause upon the questions, and for the reasons, hereinbelow set forth, viz.:

1. Because the Court has misunderstood the facts relating to the presentation by these petitioners of the question relating to the deduction of freight's contribution to general average, directed by the Circuit Court.

2. Because the Court has erred in holding that the question relating to the deduction of freight's contribution to general average should have been presented by these petitioners by exception, rather than by assignment of error.

3. Because the Court has not, apparently, rendered any decision upon the questions raised by

Black's Assignments of Error, First, Second, Third, Fourth, Fifth, Ninth, Tenth, Eleventh (Vol. II, pp. 382, 383);

Banque's Assignments of Error, First, Second, Third, Seventh, Eighth (Vol. II, pp. 384, 385);

Andreasen's Assignments, First, Second, Third, Seventh, Eighth, Ninth, Tenth (Vol. II., pp. 385-387);

Nor upon the motion of all of these petitioners to dismiss the appeal of Henry P. Booth, Appellant.

I.

1. Because the Court has misunderstood the facts relating to the presentation by these petitioners of the question relating to the deduction of freight's contribution to general average, directed by the Circuit Court.

2. Because the Court has erred in holding that the question relating to the deduction of freight's contribution to general average should have been presented by these petitioners by exception, rather than by assignment of error.

The learned Judge of the Circuit Court clearly and explicitly directed the Commissioner to deduct freight's contribution to general average from the gross freight, and to credit Ward & Company with it. (Opinion, Vol. I, pp. 208, 209, 211.)

That the Commissioner so understood these directions, and acted in accordance with them, appears from his several Reports. (Draft Report, Vol. I, pp. 248, 249, 250, 251; Supplemental Report, pp. 272-277.)

The Commissioner was undoubtedly correct in so doing.

Felch v. *Hooper*, 4 Cliff. 489.

Nashua & L. R. Corp. v. *Boston & L. R. Corp.*, 49 F. R. 774.

The explicit and minute directions of the Circuit Court to the Commissioner, and regarding the particulars of the decree, (Opinion, Vol. I, pp. 206-211), were, we respectfully submit, exactly as much essential parts, or points, of the decision, and judgment, of the Circuit Court, as anything which had preceded those directions,— as *e.g.*, its decision that the cases be consolidated, (p. 173); as to the amount of salvage, (p. 189); that Darrach be dismissed, (p. 189); the various points resulting in the conclusion that the Court had jurisdiction of Ward & Co., (pp. 189-195), or the "principal question" of the case, viz., "that the vessel was entitled to receive delivery of the cargo on giving proper stipulation, for the purpose of completing her voyage," (pp. 195-206); or condemning Ward & Co. for general average, (p. 206).

That the Commissioner so understood the force and effect of these minute directions of the Circuit Court is manifest from his close and scrupulous adherence to the instructions embodied in them, as appears throughout his several Reports. See, particularly, Vol. I, Draft Report, pp. 241, 242, 243, 244, 247; 248, 249, 250; 251, 252; Supplemental Report, pp. 260, 261, 268, 269, 270, 271, 272-277: Second Supplemental Report, p. 282.

"The Commissioner has followed throughout the directions of the Court laid down in the Opinion, as he understands such directions, and has made findings in accordance therewith. He has, in addition thereto, as *amicus curiae*, called attention to what, for reasons stated, seemed to the Commissioner an inadvertence in such directions, and has stated what would be the result of correcting the same if the Court finds the correction suggested ought to be made. The Commissioner leaves it

to the Court to determine whether that is a 'departure from the directions given by the Court,' *and to deal with it accordingly.*"

That the Court *did* consider it "a departure from the directions given by the Court," is evident from the fact that the Court declined to take any notice of it.

And again, (p. 282), "The Commissioner has not felt at liberty, under the terms of the Commission, to make an absolute finding which should be at variance with the directions contained in the Commission, or to consider or allow objections which should involve his overruling the explicit directions of the Court."

In objections 2, (p. 255); 22, (p. 279), counsel for Ward & Co. have objected upon the ground that the Commissioner "has departed from the directions given by the Court."

This Court has, in fact, in its Opinion, treated at least two of the directions given to the Commissioner by the Circuit Court, as main and essential parts, or points, of the decision, and judgment, of that Court, and has discussed them as such: viz. (*a*) The direction that gross freight rather than net freight should be awarded, (Opinion of this Court, pp. 6-9). *Cf.* directions of the Circuit Court, (Opinion, Vol. I, pp. 207-209); (*b*) The direction that the net proceeds of the sale of the cargo should be the basis of the award against the cargo owners rather than the true value of the cargo, (Opinion of this Court, pp. 13, 14). *Cf.* directions of the Circuit Court, (Opinion Vol. I, pp. 206-208).

In Carver's Carriage by Sea [3rd Ed., Sect. 561] the direction of the Circuit Court to the Commissioner in regard to the method of estimating the freight (Vol. I, pp. 207-209) is described as a point "held" by the Court.

Under these circumstances, it is respectfully submitted that the only remedy, or relief, open to these petitioners, from any of the directions given to the Commissioner by the Circuit Court, was by assignments of error, as in the case of appeal from any other decision, and judgment, of the Court, and not by objections, or excep-

tions, to the findings of the Commissioner, in those instances in which the Commissioner had obeyed the explicit directions of the Court.

Not only was it the considered, and deliberate, conclusion of counsel for these petitioners that it was not open to them to object, or to except, to such findings of the Commissioner (see Commissioner's Second Supplemental Report, Vol. I, pp. 283, 284; Letter of counsel to the Commissioner, Vol. I, pp. 284, 285), but it was clearly the opinion of the Commissioner himself, and it is made entirely manifest by the Report of the Commissioner that no such objections, or exceptions, were, or would have been, considered, or allowed, by him. Not only did the Commissioner overrule each and every one of the very many objections taken to his Report, upon such points, by the Proctors for Ward & Co., stating, expressly, in each instance, that he overruled the objections because, upon the point involved, he had followed the directions given him by the Court, (Commissioner's Supplemental Report, Vol. I, pp. 260, 261, objections 1, 2, 3, and 4; objection 5; p. 268, objections 8 and 9; p. 269, objection 10; p. 270, objection 14; p. 271, objection 17), but the Commissioner says, expressly, (p. 282), "*The Commissioner has not felt at liberty, under the terms of the Commission, to make an absolute finding which should be at variance with the directions contained in the Commission, or to consider or allow objections which should involve his overruling the explicit directions of the Court.*

As a question of general admiralty practice, too, petitioners respectfully insist, that it is simply unheard of to take objections, or exceptions, to the report of any commissioner, or assessor, upon points upon which the commissioner, or assessor, has obeyed the directions of the Court. Take, for example, the simple and common case of a reference by the Court, to a commissioner, or assessor, to assess damages in a case of collision. The Court directs that the damages be assessed in a particular manner, *e. g.*, "damages for the libellant," or "damages divided." It has never been suspected by counsel that it was necessary, or competent, to take objections, or exceptions, to the report of the commissioner, or assessor, for assessing the damages

in the manner and form directed, but the aggrieved party has always raised the question, and sought his relief, by appeal and assignments of error, and has always obtained his relief, if he was entitled to any, in this way.

In the case at bar, however, in view of the fact that the Circuit Court did, in the Opinion, (Vol. I, p. 206), apparently, invite "from either party suggestions touching any error into which we have fallen with reference to the details thereof," the Proctors for these petitioners, in their letter to the Commissioner, (Vol. I, pp. 284, 285), stated to the Commissioner, in reference to this very question of "freight's contribution in general average" (*b.* p. 285), that they did not consider it competent, or proper, to file formal objections with the Commissioner to his Report upon those points upon which he had followed the directions of the Court, and that they would follow the course thus apparently suggested by the Court "at the earliest opportunity" after the filing of the Report; and they did, at the first opportunity offered them, call this question of freight's contribution to general average,—as well as other matters which they desired to suggest in conformity to the invitation of the Court,—to the attention of the Circuit Court. And in verification of this statement these petitioners annex to this petition copies of the joint brief of their Proctors, filed in the Circuit Court, and presented to the Circuit Court at the hearing upon the "exceptions of the owners of cargo and of James E. Ward & Co.," to the Commissioner's Report and Supplemental Report, and respectfully request to be allowed to refer thereto; and, more particularly, to p. 13, and **4**, p. 16, of said brief.

Of the various matters thus suggested by these petitioners to the Court, the Circuit Court, at said hearing upon the exceptions of Ward & Co., considered suggestions **1**, pp. 13, 14, [see Opinion, Vol. I, p. 350]; **2**, pp. 14, 15, [Opinion, pp. 355-357]; **3**, pp. 15, 16, [Opinion, p. 357], and took no notice of suggestions **4**, **5**, **6**, pp. 16-18.

So, too, this Court in its Opinion has considered at least two of the Assignments of Error made by these petitioners, (Vol. II., pp.

381-387), viz., Black's Assignments Sixth and Seventh; Banque's Assignments Fourth and Fifth; Andreasen's Assignments Fourth and Fifth, (Opinion, pp. 6-9); also, Black's Assignments Third, Fourth; Banque's Assignments First, Second; Andreasen's Assignments First, Second, (Opinion, pp. 13, 14). And yet these petitioners did not technically object, or except, to the Commissioner's Report in these respects, any more than they did to his Report regarding "freight's contribution to general average."

It is to be noted, too, that the Circuit Court gave no relief to Ward & Co., upon any of their exceptions, (p. 5, above), in which they excepted to findings by the Commissioner in accordance with the directions of the Court,—thus again showing that the Circuit Court considered these directions as final, and not the proper subject of exceptions.

It appears from what has been stated above, (pp. 4-6), that the statements contained in the Opinion of this Court to the effect that this question regarding the "deduction of freight's contribution to general average" is "presented here in the appellate court for the first time," (p. 10); "nor was any objection or exception in this regard taken to the regulations promulgated by the Circuit Court under which the master was to work out his results," (p. 11); "no exceptions were taken by these parties to the computation upon the hearing before the Circuit Court," (p. 11); "this question was first raised upon the record by the assignment of errors," . . . are incorrect and do much injustice to the skill and diligence of counsel.

Nor do these petitioners ask, nor have they ever "intended, to rely upon objections to computations by the commissioner," (p. 10); but they have sought, and by this petition still seek, to induce this Court to adopt the finding of the Commissioner, which is not in accordance with the directions of the Circuit Court, which finding is demonstrated on the face of the Commissioner's Report, (Vol. I, pp. 272-277), to be the correct and fair one, while the finding directed, and now confirmed, by the Circuit Court, is so clearly demonstrated to be incorrect and unjust, and is denominated by the Commissioner as merely "an alternative finding," (p. 277).

Whether "the preliminary opinion of the Circuit Court justified the commissioner's mode of computation in his first report," (p. 10) or not, it is certain that the Circuit Court confirmed the "Commissioner's mode of computation," adopted in his Supplemental Report, (Vol. I, pp. 272, 273; Opinion, pp. 358, 359), although the Commissioner protested against this mode of computation; explicitly stated that his attention had been fully called to its wrongfulness by these petitioners, (Vol. I, pp. 283-285); only reported it at all, (and then only as as "an alternate finding"), because he had been explicitly directed to do so by the Circuit Court; demonstrated, on the face of his report that "It must therefore be erroneous," and submitted the finding, for the adoption of which these petitioners are hereby seeking, with an account demonstrating its correctness, (pp. 273-277).

Not only did these petitioners state, orally, and in writing, their objections to this direction of the Circuit Court regarding freight's contribution to general average, before the Commissioner, (Vol. I, pp. 283-285), but the Proctors for Ward & Co. filed formal objections to the Supplemental Report of the Commissioner because he made the finding upon this point which he declared to be the only correct and just finding, and because, in so doing, he "has departed from the directions given by the Court . . . and, in the capacity of *amicus curiae*, has suggested a different rule from that laid down by the Court," (Objections 21, 22, 23, 24, of Ward & Co., Vol. I, pp. 279, 280); and these petitioners then brought the whole matter explicitly to the attention of the Circuit Court, at the first and only opportunity afforded them;—viz., at the hearing before the Circuit Court upon the exceptions of Ward & Co., to the Commissioner's Report; and, at that hearing, the exceptions of Ward & Co., also, brought the same point directly before the Court, (Exceptions 18, 19, 20, 21 of owners of cargo, and of Ward & Co., to the Commissioner's Report and Supplemental Report, Vol. I, pp. 347, 348).

The situation then was one "where error" could have been "easily corrected," (Opinion p. 10), urged, as it is shown to have been; for the Circuit Court, at said hearing, had before it, upon this point, (*a*) the exceptions of Ward & Co., (*b*) the protest and suggestions

in the letter of all of the other parties, (c) the Supplementary Report of the Commissioner, in which he fully set forth the error into which the Circuit Court had fallen, and reported fully the correct calculation, and urged its adoption, reporting the method directed by the Circuit Court only as an alternative, and demonstrating, and remarking of it, (p. 273), "It must therefore be erroneous."

These petitioners had "distinctly stated" their objections and exceptions upon this point to the Commissioner, *even before* "the coming in of the report," (Opinion, pp. 10, 11), and the Commissioner in his Supplemental Report called the attention of the Court to this manifest error, and furnished every means for its correction; and, again, these petitioners, (Opinion, p. 11), "upon the hearing before the Circuit Court, upon the question as to its acceptance, to the end that" this error, manifest and "apparent," to all, should be corrected, stated their objections, again. It was not even necessary to recommit the report to the Commissioner for correction upon this point, for the Commissioner had already fully corrected it; certainly "it could have been easily corrected by recommittal," (Opinion, p. 11), though recommittal was, and is, unnecessary.

Under the circumstances, how can it fairly be said that the point can, or "should be treated as waived"; or, (Opinion, p. 11), that "the Circuit Court was warranted in viewing it as one which the parties did not desire to press"?

Nor, again, we respectfully urge, is it true that, either as matter of fact, or "as a result, the cases have proceeded upon other lines for several years," nor that any disturbance of "the findings, calculations," or, to any considerable extent, "the decrees" is involved in correcting this error, (Opinion, p. 11). There is merely involved the adoption of one sum, — already reported by the Commissioner as manifestly correct and just, (and the awarding to the salvors their proportion of it), — for another, the sum adopted by the Circuit Court, — reported by the Commissioner as manifestly "erroneous," and which the slightest consideration shows to be unjust. No conduct, or omission, of these petitioners has caused any misunderstanding, or misapprehension, to any person, or party, regarding this point; the cases have proceeded on no lines other than

such as would have been followed, had these petitioners filed formal objections,— which, as already shown, would have been wholly disregarded, as a matter of duty, by the Commissioner; and the first divergence, (apart from the incorrect direction given to the Commissioner by the Circuit Court and its consequences), from regular lines is found in the Second Opinion of the Circuit Court, (Vol. I, pp. 349-359), filed April 20, 1900, in which the Circuit Court, (pp. 358, 359), adopted the amount reported by the Commissioner as erroneous, and ignored his report and recommendation of that which was correct;— and the cases were brought to this Court at the earliest possible date thereafter.

The manner in which the Circuit Court thus ignored the Report of the Commissioner upon this point, and adopted merely his alternative and "erroneous" report, is another indication that the Circuit Court regarded its instructions to the Commissioner as parts of its original decision and judgment. From that original decision and judgment, and from the various component parts of it, the only remedy of these petitioners was by appeal and assignment of error to the decision of the Circuit Court upon this point; and this remedy these petitioners respectfully pray may be allowed them.

If the 83d rule of practice in equity, referred to by this Court, (Opinion, p. 10), is deemed applicable, we desire to note that the Circuit Court wholly disregarded the provision of the 84th rule of practice in equity, for it awarded no such costs as that rule provides as against Ward & Co., although it overruled all of their exceptions,— and this Court has gone farther and has pronounced some of said exceptions "frivolous," (Opinion, p. 12).

But even under the 83d rule of practice in equity, and even had the error been that of the Commissioner, no exception to his report was requisite or applicable.

The error was in the direction given by the Circuit Court, and was, so far as the Commissioner was concerned, an error of law.

Celluloid Manufacturing Co. v. *Callonite Mfg. Co.*, 40 F. R. 476.

Felch v. *Hooper et al.*, 4 Cliff. 489.

Nashua & L. R. Corp. v. *B. & L. R. Corp.*, 49 F. R. 774.

See, also, in admiralty,—

The New Jersey, Olcott, 444; F.C. 10,162.
Hovey v. *The Sarah E. Brown*, F.C. 6,744.

Admiralty Rule 44, referred to by this Court, (Opinion, p. 10), *so far as regards matters of practice*, certainly makes no reference to the 83d Equity Rule; and, so far as petitioners know, no decisions have ever before assumed that those rules had any relations to each other in this respect.

In fact, it has been distinctly held in the Circuit Court that *upon an admiralty appeal* the appellant may object to damages found by a Commissioner in the lower Court, although no exceptions were filed thereto.

Ross et al. v. *Southern Cotton-Oil Co.*, 41 F.R. 152.

As already shown, (pp. 7-10, above), the true Report of the Commissioner upon this point *was entirely in favor of these petitioners*, (Vol. I, pp. 273-277; see, particularly, 3d and 4th paragraphs on p. 277). There was no conceivable reason why they should except to it.

If the remedy of these petitioners for relief from the incorrect direction given by the Circuit Court to the Commissioner had been by exception, and not by appeal and assignment of error,— which we respectfully and insistently deny,— then these petitioners claim that they did, to all practical intents and purposes, object and except to such incorrect directions; and such objection and exception is found in the letter of Proctors for these petitioners to the Commissioner, (Vol. I, pp. 284, 285). The Commissioner further *certifies* that said Proctors explicitly called his attention to the erroneous direction given by the Circuit Court, and that, in consequence, he corrected his Report, finding, as it was contended by said Proctors that he ought to find, and reporting the "erroneous" finding simply as an alternative to be adopted by the Circuit Court only in case that Court should hold that it had, by its direction, already decided the point.

What other, or further, office could any form of objection, or exception, fulfil? It called the matter explicitly to the attention of the

Commissioner, and he corrected his report accordingly; and it called the attention of the Circuit Court to the point, as also did the Supplemental Report of the Commissioner, and the exceptions of Ward & Co.; and the Court had every opportunity to correct the error in its direction or to recommit the Report.

Even in the practice under the 83d rule in equity, no particular or technical form of exception is required.

Central Trust Co. v. *Wabash, St. L. & P. Ry. Co.*, 57 F. R. 441, 444, 445.

The error and injustice of crediting Ward & Co. with freight's contribution to general average is so manifest and inequitable, that, we earnestly submit, no Court should lend its countenance to it, unless absolutely constrained to do so. The Commissioner, at pp. 272-277 of his Supplemental Report, has so fully and correctly set forth the wrongfulness and injustice of allowing Ward & Co. this credit, that we respectfully refer to his statement of the matter and do not repeat it here. To allow Ward & Co. such credit is to credit the debtor with debts of the creditor with which the credited debtor has nothing to do, and in which he has no right, title or interest.

If this result must follow as a result of the several Proctors for these petitioners, (and the Commissioner, too), having considered that the true remedy was by appeal and assignment of error, and not by exception, we respectfully ask this Court to interfere to prevent such a wrong. This Court has interfered on its own motion to modify a decree of the District Court, in favor of seamen, in an instance in which their proctors *had not only filed no exceptions, but had made no assignments of error*, (in violation of Rule 11), upon the point involved.

The Chattahoochee, 74 F. R. 899, 906.
(See, too, *Cuddy* v. *Clement*, 113 F. R. 454, 457.)

The petitioners Black, et al., and Andreasen, are quite as much "wards of the court in admiralty," as were the mate and crew of the Golden Rule in The Chattahoochee. They are all either poor sea-

men, in a humble station of life, or widows or representatives of such men, and all in necessitous circumstances.

Unless the Court shall grant relief to these petitioners, upon this point, Ward & Co. will unjustly be benefitted to the amount of $1525.43, — the property of these petitioners, — to which they, Ward & Co., have no shadow of right, title or interest; and that, too, when this Court has already found, (as did the Circuit Court), "Their interference, even under the regular forms of maritime procedure, was unwarrantable and inexcusable under the circumstances," (Opinion, p. 14); that, in the situation into which Ward & Co. have brought the case, only an approximation to justice to these petitioners can be reached, at best, and much of the damage inflicted by Ward & Co. has become irreparable; and that "on the whole, in our opinion, the judgment is rather too favorable to Ward & Co., than otherwise," (Opinion, p. 10.)

II.

Because the Court has not, apparently, rendered any decision upon the questions raised by —

Black's Assignments of Error, First, Second, Third, Fourth, Fifth, Ninth, Tenth, Eleventh (Vol. II., pp. 382, 383);

Banque's Assignments of Error, First, Second, Third, Seventh, Eighth (Vol. II., pp. 384, 385);

Andreasen's Assignments, First, Second, Third, Seventh, Eighth, Ninth, Tenth (Vol. II., pp. 385-387);

Nor upon the motion of all of these petitioners to dismiss the appeal of Henry P. Booth, Appellant.

And this Court, and these petitioners, are informed that it is the intention of Ward & Co. to apply to the Supreme Court of the United States to grant a writ of *certiorari*, to bring these cases before that Court; and petitioners are advised, and believe, and therefore aver, that they will, or may, suffer prejudice and injury in that Court, if the issues raised by the Assignments of Error and Motion

above-mentioned, do not appear to have been fully determined and settled by the Court.

CATHARINE T. BLACK, ADMINISTRATRIX,
Libellant, Appellant and Appellee,

BANQUE DE GENES,
Libellant, Appellant and Appellee,
by EDWARD S. DODGE, *Proctor.*

HANS ANDREASEN,
Libellant, Appellee and Appellant,
by JOHN LOWELL,
JAMES A. LOWELL, *Proctors.*

CERTIFICATE OF COUNSEL.

We, Edward S. Dodge, John Lowell, and James A. Lowell, certify that we are Proctors for the Petitioners; that in our opinion the foregoing Petition is well founded, both in point of law and on questions of fact; is deserving of judicial consideration, and is not interposed for delay.

EDWARD S. DODGE.
JOHN LOWELL.
JAMES A. LOWELL.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

No. 162.

THE ELIZA LINES, HER CARGO AND FREIGHT.

CONSOLIDATED CAUSE.

BRIEF

For William W. Black, Libellant, Appellant and Appellee; Hans Andreasen, Claimant, Appellant, Libellant, Appellee; and for the Banque de Genes, Libellant, Appellant and Appellee, upon the "exceptions of the owners of cargo and of James E. Ward & Co." to the Commissioner's Report and Supplemental Report.

This case was most elaborately tried, and patiently heard, before the Commissioner. It was under examination at intervals from January, 1895, to November, 1897 (pp. 285-288). After the Commissioner had once concluded his first Draft Report (July 21-August 7, 1896; p. 286), additional hearings were granted at the request of the Proctors for James E. Ward & Co., and additional evidence was adduced by them; so that the hearing on the Draft Report was postponed more than a year, viz., to October 7, 1897 (pp. 260, 287).

To the Draft Report, Proctors for Ward & Co. filed 17 objections (pp. 255-260), all but 3 of which were overruled by the Commissioner, in his Supplemental Report (pp. 260-277).

Thereupon, Proctors for Ward & Co. repeated all of the objections which the Commissioner had overruled, and filed 8 additional objections (pp. 278-280), all of which were overruled by the Commissioner in his Second Supplemental Report (pp. 280-288).

If any substantial doubts should be found to exist as to any of the elements of the Commissioner's computations, or findings, they must operate against the wrong doer, — James E. Ward & Co., the owners of cargo.

Taber et al. v. *Jenney et als.*, 1 Sprague, 315, 323.
The Mayflower, Br. Adm. 376, 389, 390.
The Margaret J. Sanford, 37 F.R. 148, 152.

The Commissioner was appointed at the request, and with the consent, of all of the parties interested,—(the Court stating, in fact, that it would appoint no one as Commissioner in the case who was not acceptable to all of the parties).

"The reference to a commissioner was authorized by rule 44 in admiralty. The commissioner, under that rule, had and possessed all the powers in the premises which are usually given to and exercised by masters in chancery in reference to them. The reference was with the written consent of parties, and was presented to and made by the court as the result of such consent. The same regard must be had for the findings of the commissioner under these circumstances as would have been shown to the findings in a report of a master in chancery. The conclusions of a master on matters of fact are, under all circumstances, entitled to great respect." (Authorities cited.) "And when, as in this case, both parties present to the court a consent order providing for a report by the master of his conclusions upon the facts and the law, the court will not disturb his conclusions of fact, unless they are clearly in conflict with the weight of the evidence."

SIMONTON, J., *The Elton*, 83 F.R. 519, 520 [U.S. C. C. A., Fourth Circuit].
Kimberley v. *Arms*, 129 U.S. 512, 524.
Davis v. *Schwartz*, 155 U.S. 631.
The Cayuga, 59 F.R. 483.
The Ohio, 91 F.R. 547, 560.
Kilgour v. *National Bank et al.*, 97 F.R. 693.

Exceptions 1, 2, 3, 4, 5 (pp. 343, 344).

[*Identical with objections 1, 2, 3, 4, 5 (p. 255), repeated p. 278.*]

These exceptions are fully met and answered by the Commissioner in overruling objections 1, 2, 3, 4, 5, at pp. 260, 261 of his Supplemental Report, and at p. 280 of his Second Supplemental Report; also, see Report, pp. 242-244.

To allow Exceptions 1, 2, 3, 4, 5, would be to render nugatory the opinion of this Court regarding the legal effect of the sale of the cargo at Boston, and the wrongful act of the owners of the cargo in procuring such sale.

The investigations before the Commissioner have brought out the admission from the owners of the cargo that the cost of the cargo at Pensacola, the port of shipment, was $3,460.77 (pp. 246, 337, 338).

The vessel, when overtaken by the disaster which led to her temporary abandonment, had performed about 1/3 of her voyage, and had performed the most difficult part of it. (*Gorham*, Nos. 3545, 3546, p. 80, Ints. 17-23.)

Ward & Co. had insurance upon the cargo in the Atlantic Mutual Insurance Company, to the amount of $4,500. (*Amendment of Claim, p. 15*), and received $4,560 from the insurer as a total loss. (*Policy, pp. 44-47.*)

The cargo was not at all suited to the Boston market, and the sale of it in that market,—found by the Court to have been wrongfully procured by Ward & Co.,—was a sacrifice of it. (Test. of *West*, p. 77; *Gorham*, p. 81, X-Q. 29-33; *Hunt*, p. 86, X-Q. 34-38; *Ellicott*, pp. 89, 90, X-Q. 18-20; *Madden*, pp. 102-108, Q. 1-22; X-Q. 26-49, 58-60, 66-69.)

The cargo was sold by the Marshal on November 29, 1889, for $1,825, which amount was diminished by the expenses of sale, etc., so that, as a result of this sale, forced by Ward & Co., only $910.74 remains, net (p. 14).

It is evident then that,—

(*a*) Had it not been for the decision of this Court, overruling the proceedings in the District Court, Ward & Co. would have escaped payment of any freight, and would have received from their insurer

more than $1,100 in excess of the cost of the cargo, at the port of shipment.

(*b*) To allow Exceptions 1, 2, 3, 4, 5, by taking as the contributing value of the cargo in general average its value in Boston in September, 1889, would be to allow Ward & Co. to take advantage of their own wrongful act.

This Court, in limiting the recovery of salvage against cargo to a portion of such sum as remains from the Marshal's sale (Opinion, pp. 37, 38), instead of following the course indicated at (*b*) pp. 25, 26 of the former brief for Black, will now permit Ward & Co. to take advantage of their own wrongful act to the injury of the lien of the salvors: We submit that the Court will not also permit a similar injury to the lien of the owner of the vessel for general average.

There is no evidence as to the value of the bark Eliza Lines at Montevideo or Buenos Ayres at any time; nor is there evidence of the value of the cargo in Boston in September, 1889, apart from what might be inferred from the sale by the Marshal in November, and the evidence regarding such sale.

Exceptions 6, 7 (p. 344).

[Exception 6 is identical with objection 6 (pp. 255, 256), repeated p. 278, omitting request to report evidence at end of latter; which request the Commissioner complied with (pp. 261-267). Exception 7 is identical with additional objection 18 (p. 278)].

Both exceptions are answered by the Commissioner in overruling objection 6, at pp. 261-267 of his Supplemental Report, and at pp. 280, 281 of his Second Supplemental Report; see, also, Report, pp. 245, 246.

There was abundant competent evidence before the Commissioner to sustain the conclusion at which he arrived in regard to the value of the cargo of the Eliza Lines at the time and place indicated; and *no evidence was offered in contradiction.*

1. *Coolidge S. Roberts*, doing business in hard pine lumber at Buenos Ayres, as a member of the firm of C. S. Roberts & Co., and at Boston, as a member of the firm of N. W. Rice & Co. (p. 289,

Q. 1-4; pp. 292, 293, X-Q. 24-27; p. 301, Q. 102), testified that he was acquainted with the market prices of such lumber as constituted the cargo of the Elisa Lines, on or about January 1, 1890, at Buenos Ayres or Montevideo; that it was a part of his business to know the market prices of lumber in those places at the time; and that that price was from $39 to $41 Argentine gold,— per thousand superficial feet on board the vessel,— the American dollar being, at that time, equal to 1.0364 Argentine dollars (pp. 289-292, Q. 5-11, 15-21, 23; pp. 292-298, X-Q. 24-61; pp. 298-301, Q. 91-94, 98-103; pp. 301-303, X-Q. 104, 105, 111-118; p. 303, Q. 119-121). [See, too, pp. 261-266.]

Mr. Roberts also testified that that same price continued for all of one month, subsequent to January 1, 1890 (p. 291, Q. 13-14).

The competency of the testimony of Mr. Roberts as to market value was not objected to by Ward & Co. (as alleged in last 2 lines of Exception 6, p. 344); it was only its materiality that was objected to by them (pp. 289, 290, Q. 6-8), thus raising merely the question already discussed in relation to Exceptions 1-5. The testimony of Mr. Roberts was, unquestionably, competent as to the market price of lumber in Buenos Ayres or Montevideo in January, 1890, and no testimony was offered in contradiction of it.

2. *W. P. Truesdell* testified that he was stenographer for the firms S. W. Rice & Co. and C. S. Roberts & Co., and had charge of the correspondence of those firms with members of the same firms in Buenos Ayres, and was acquainted with their respective handwriting. He produced letters from members of those firms in Buenos Ayres to the firms in Boston, reporting sales of hard pine cargoes at Buenos Ayres, and also original accounts of sales made in Buenos Ayres early in 1890, substantially confirming the testimony of Mr. Roberts as to market price (pp. 303-307, Q. 1-31; pp. 307-309, X-Q. 32-52; pp. 309, 310, Q. 53-57; *Account Sales*, pp. 311, 312). [See, too, pp. 266, 267.]

The testimony of Mr. Truesdell was competent.

Frauenstein's Champagne, 3 Wall. 145.
Cliquot's Champagne, 3 Wall. 114.

Alfonso v. *United States*, 2 Story 421.
Whitney et al. v. *Thacher et al.*, 117 Mass. 523.
Washington Ice Co. v. *Webster*, 68 Me. 449, 463.
Laurent v. *Vaugn*, 30 Vt. 90.
Lush, Ex'x v. *Druse*, 4 Wendell, 313.
Harrison et al. v. *Glover et al.*, 72 N.Y. 451, 453.

In any event, however, Ward & Co. should be held estopped to object to the finding of the Commissioner regarding the value of the cargo of the Eliza Lines at Buenos Ayres or Montevideo.

> "It has been established as a general rule of evidence, that the burden of proof lies on the person who wishes to support his case, by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant."
>
> *Best on Evidence*, § 274 p. [*375.]

The firm of Ward & Co. were, evidently, regularly and constantly engaged in the business of shipping cargoes of hard pine lumber to Buenos Ayres and Montevideo. (See *Charter Party*, pp. 35, 36; *Form of open policy*, pp. 44-47; *Dep. Nicoll*, p. 38, Q. 5.)

W. H. T. Hughes,—the only member of the firm of Ward & Co. who has ventured to testify in the case, at any stage,—distinctly evaded answering questions intended, on cross-examination, to reveal the value of this cargo (pp. 97-99, Q. 2-5; X-Q. 8-10).

It can safely be presumed that Ward & Co. were entirely familiar with the value of this cargo, at Buenos Ayres and Montevideo; such familiarity must have been a necessary element in determining their action in regard to the cargo in this case. Ward & Co.'s witness Darrach,—their agent and representative in this matter,—pretends to familiarity with the market value of lumber, at Buenos Ayres and Montevideo (p. 318, Q. 27-31; pp. 323, 324, X-Q. 75-83).

Yet Ward & Co. did not venture to offer any evidence upon the subject.

Evidence corroborative of the finding of the Commissioner is found in the now admitted fact that the invoice value of the cargo at Pensacola was $11.75 per thousand (pp. 246; 337, 338); add to this the

freight of $20 per thousand (*see Charter Party*, pp. 35, 36), and a reasonable advance for insurance, interest, profit, etc.

Exception 8 (p. 344).

[Substantially identical with objection 7 (p. 256); repeated p. 278.]

This exception is answered by the Commissioner in overruling objection 7, at pp. 267, 268 of his Supplemental Report, and at p. 280 of his Second Supplemental Report; also, see Report, p. 246.

The best evidence as to the condition of the cargo of the Eliza Lines, at Boston, is found in the testimony of *Charles West*, surveyor of lumber, who examined the cargo after it had been discharged. It clearly establishes the fact that not more than 1/3 of the cargo was wet at all, and that mere wetting would not injure it (pp. 76, 77). See, too, testimony of *Madden*, purchaser of 1/3 of the cargo (pp. 102-108; Q. 1-12; X-Q. 76-79); and of *Lootz* (p. 313, Q. 1-5; p. 314, X-Q. 6; p. 337, Q. 1-5; p. 338, Q. 2, 3).

The only witness who gave any testimony from which any such depreciation as "at least thirty-three and one-third per cent" could derive the slightest countenance was *Bradford Darrach*, pp. 316-333.

This person testified, on direct examination, that, when he saw it, in September, 1889, at Boston, if he had had the lumber "in a market suitable for it," "he should have figured the damage at anywhere from twenty-five to forty per cent" (pp. 317, 318, Q. 17-27); and that the damage to the cargo of the Eliza Lines would have injured its value at Buenos Ayres and Montevideo, "not less than thirty per cent,—probably more" (p. 318, Q. 31; p. 324, X-Q. 78-82; p. 330, Q. 117). He also thought that the cargo was worth as much in Boston as in any market (pp. 326, 327, X-Q. 91-103).

On cross-examination, however, it appears that Darrach—

(*a*) does not even know enough of the subject to know that there is no difference between yellow pine and pitch pine lumber; he thinks that there *is* a difference (p. 319, X-Q. 32-37; *Cf. Roberts*, p. 292, Q. 23);

(*b*) never saw the cargo of the Eliza Lines after it had been discharged from the vessel (p. 320, X-Q. 42-48);

(*c*) never saw any portion of the cargo, outside of the vessel (p. 320, X-Q. 48);

(*d*) cannot say that he ever saw any portion of the cargo which was contained in the hold, — where 8/9 of it was (pp. 320-323, X-Q. 45-66);

(*e*) has no knowledge as to how much water, if any, was in the hold of the vessel (p. 317, Q. 23; pp. 330-332, X-Q. 118-128);

(*f*) yet claims that from merely seeing the deck load, — about 1/9 of the cargo, — he can judge of the condition of the remainder of the cargo all through the hold (pp. 320-331, X-Q. 49, 53, 54, 67-73, 122-125):

(*g*) He has no maritime experience, and has never been in Buenos Ayres, or Montevideo, and has no competent knowledge of the market there (pp. 323, 324, X-Q. 75-83; p. 332, Q. 129);

(*h*) And, notwithstanding the contradictory evidence with which he began (p. 7 above), on re-direct examination says that he thinks that the damage would have increased, had the cargo been reshipped and carried to Montevideo (p. 328, Q. 107-109; pp. 329, 330, X-Q. 110-116; *Cf. West*, p. 76); and that he reported to the insurer that, "*if the cargo went forward to Montevideo it would be a total loss and more*" (p. 331, Q. 126, 127):

(*i*) Finally, he caps the climax of absurdity, by testifying that even if he had no information from pilot, master, or any one else, from his own inspection he would have pronounced the same judgment as to damage of the cargo (pp. 332, 333, Q. 130, 131).

And this is the person from whose manifest ignorance and self-conceited persistence all of the trouble and heavy loss involved in this case have arisen (p. 317, Q. 17-22; p. 319, X-Q. 38-41; pp. 331, 332, X-Q. 122-125, Q. 126-128).

Surely, the Commissioner would have been greatly in error had be based his judgment on such manifestly unreliable testimony as that of Darrach; and, besides this, the Commissioner had the witness personally present before him, and could judge of his appearance, while testifying (p. 283).

Exceptions 9, 10 (p. 345).

[Substantially identical with objections 8, 9 (pp. 256, 257); repeated p. 278.]

These exceptions are answered by the Commissioner in overruling objections 8, 9, at pp. 268, 269 of his Supplemental Report, and at p. 280 of his Second Supplemental Report; see, also, Report, pp. 249, 250.

The fallacy of the position of counsel for Ward & Co. in insisting upon Exceptions 9, 10 (objections 8, 9), consists in ignoring the fact that, owing to the unwarrantable conduct of Ward & Co., in regard to the cargo, the hands of Andreasen, the master, were practically tied, in relation to making, or completing, repairs of the Eliza Lines.

On October 18, 1889, Andreasen filed his petition to be allowed to give stipulation for the cargo, in order that he might carry it to its destination and earn the freight (Nos. 3545, 3546, pp. 10-12).

On the same day Darrach, on behalf of Ward & Co., filed a motion for a sale of the cargo (p. 13), and, also, a libel for possession (No. 3547, pp. 1-3).

It was not, however, until November 16, 1889, that the Court denied the petition of Andreasen, and ordered the cargo sold at public auction (p. 13), (*Opinion of the Court*, pp. 73, 74).

During all of this time Capt. Andreasen was delayed, and held in uncertainty, as to discharging and otherwise dealing with the cargo, as well as to what the final disposition of the cargo was going to be, and, consequently, what action he ought to take in regard to his vessel.

The Marshal, pursuant to the order of the Court, did not sell the cargo until November 29, 1889 (pp. 13, 14).

The whole matter of the delay is fully explained in the testimony of *Mr. Lootz* (p. 314, X-Q. 13, 14; pp. 339, 340, Q. 4-6; X-Q. 7-13).

The market price of the cargo remained the same *throughout* the month of January, 1890 (p. 5 above); so that, in that aspect, the

exact date of the supposititious arrival of the Eliza Lines at Buenos Ayres is not of the least consequence.

Exception 11 (pp. 345, 346).

[Identical with objection 10 (p. 257); repeated p. 278.]

This exception is answered by the Commissioner in overruling objection 10, at p. 269 of his Supplemental Report, and at p. 280 of his Second Supplemental Report; see, also, Report, pp. 249, 250.

We respectfully submit, however, that the deduction of the freight of the Eliza Lines to Lisbon, or any part of said freight, or the crediting of said freight, or any part of it, to Ward & Co., although plainly directed by the Court, is contrary to correct principle, and incorrect, as matter of law.

See suggestion **3**, pp. 15, 16, below.

Exceptions 12, 13 (p. 346).

[Identical with objections 12, 13 (p. 258); repeated p. 278; the substance of them was, also, the subject of a "protest" before the Commissioner (p. 252).]

These exceptions are fully answered by the Commissioner in overruling objections 12, 13, at p. 270 of his Supplemental Report, and at p. 280 of his Second Supplemental Report; see, also, Report, pp. 249, 250, 252.

The question involved—(of alleged "appropriation" to salvors)—has, already, been argued before this Court and elaborately urged by the Proctors for Ward & Co. at the original hearing of this case.

The equitable views of Ward & Co. are well exhibited by these exceptions. Having by their wrongful conduct,—(undertaken for the supposed advantage of themselves and their insurers),—practically succeeded (under the present decision of the Court) in rendering valueless the lien of the salvors upon the cargo for salvage (p. 4 above) so that salvors will, under said decision, receive nothing approaching 45 per cent of the cargo, or 45 per cent of the real value of the cargo, Ward & Co. now think it would be about right to again seek to gain advantage of their wrongful act, and to limit the claim of the salvors for salvage against the freight, and of the

ers, for general average against the cargo and freight, to 55 per cent of the cargo, and of the inconsiderable amount for which they procured the cargo to be sold in pursuance of the ignorant ideas of Darrach (pp. 7, 8, above).

Exception 14 (p. 346).

[Identical with objection 14 (p. 258); repeated p. 278.]

Nothing need be added to the reasons given by the Commissioner in overruling objection 14, p. 270 of his Supplemental Report, and p. 280 of his Second Supplemental Report.

Exception 15 (p. 346).

[Substantially identical with additional objection 19 (p. 278).]

This exception, too, is fully answered by the Commissioner in overruling additional objection 19, p. 281 of his Second Supplemental Report.

Exception 16 (p. 347).

[Identical with additional objection 20 (p. 279).]

This objection, also, is fully answered by the Commissioner in overruling additional objection 20, at p. 281 of his Second Supplemental Report.

Exception 17 (p. 347).

[Identical with objection 17 (pp. 259, 260); repeated p. 278.]

This exception is fully answered by the Commissioner in overruling objection 17, pp. 271, 272, of his Supplemental Report, and p. 280 of his Scond Supplemental Report.

Had the voyage been completed (as it would have been except for the wrongful acts of Ward & Co. and Darrach), upon a general average adjustment the owner of the Eliza Lines would undoubtedly have been entitled to receive from Ward & Co. the cargo's proportion of the amounts referred to in Exception 17. It seems, therefore, frivolous for Ward & Co. to interpose the objection that "no one is entitled to receive the same" when, in place of a general average adjustment, made at the end of an orderly prosecution of the voyage, they have wrongfully succeeded in forcing upon the owner of the Eliza Lines

a long, complicated and expensive litigation in order to maintain his plain legal rights, and certain, in any event, to fall far short of any adequate restoration to those rights.

Exception 18 (p. 347).

[Identical with additional objection 21, p. 279.]

This exception is fully answered by the Commissioner in overruling additional objection 21, at p. 281 of his Second Supplemental Report.

As already suggested (p. 10, above), we respectfully submit that the deduction of $1,049.62, net freight of the Eliza Lines to Lisbon is incorrect; we also make the same suggestion as to the crediting to Ward & Co. of the sum of $1,708.39, from the proceeds of the sale of the cargo.

See suggestion **1**, pp. 13, 14, below.

Exceptions 19, 20, 21 (pp. 347, 348).

[Exception 19 is substantially identical with additional objection 22; Exceptions 20, 21 are identical with additional objections 23, 24 (pp. 279, 280).]

These exceptions are fully met by the Commissioner in overruling objections 22, 23, 24, at pp. 281, 282 of his Second Supplemental Report.

In many (if not all) of their preceding exceptions and objections, Proctors for Ward & Co. have objected and excepted to the findings of the Commissioner *because he had followed the explicit directions given by the Court in the Opinion.*

It is certainly a novelty in admiralty practice to except, or object, to findings of a Commissioner *made in pursuance of the decision, or explicit directions of the Court.* The remedy, in such a situation, has always, it is submitted, been understood to be by appeal from the decision containing such directions.

And in Exceptions 19, 20, 21, moreover, Proctors for Ward & Co. have objected and excepted to the findings of the Commissioner because he has *not* followed the explicit directions of the Court.

Exceptions 19, 20, 21 are so fully answered by the Commissioner

in overruling additional objections 22, 23, 24, at pp. 281, 282 of his Second Supplemental Report, that it is not necessary for us to add more. The Commissioner at pp. 272-277 of his Supplemental Report has so fully set forth the point—(called to his attention by Proctors for all parties interested excepting Ward & Co., pp. 283-285)— that Ward & Co. are not entitled to any credit of freight's contribution to general average, and the fact that they are not entitled to any such credit is so clear, that if the Court shall not see fit to adopt the alternative finding of the Commissioner in his Supplemental Report, pp. 274-277, upon this point, we have no remedy excepting upon appeal.

See, too, suggestion **4**, p. 16, below.

SUGGESTIONS.

In compliance with the invitation upon p. 34 of the Opinion we respectfully submit the following suggestions.

1. The credit to Ward & Co. of the proceeds of the cargo in the registry.

It is three times stated in the Opinion (pp. 34, 36, 38), that the proceeds of the cargo in the registry were applied toward payment of freight and general average "*without objection*" from any party. This is incorrect. Counsel for all parties interested (excepting Ward & Co.), "objected" to every proceeding of the District Court in the matter. But (it need hardly be added), no opportunity for any effective objection was afforded until the end of the case was reached, when all of these parties put their objections on record, in the *only* way open to them; viz., by appeal (*Opinion*, pp. 11, 12, Nos. 3545, 3546, pp. 70-73; No. 3548, p. 10). Again, "*no claim for general average is allowed*" (*Decree*, No. 3548, p. 9; *Opinion*, p. 11.)

It is evident that the ideas of the Judge of the District Court were: (*a*) that the sale of the cargo was justifiable (for he ordered it); (*b*) that, as, in consequence of his views, only $910.74 were, ultimately, left in the reach of, or at the disposition of, the Court, to answer to any of the various indebtedness of Ward & Co., this

amount should *first* respond to the lien of the salvors, and *second* to the lien for freight; and that these two liens exhausted the whole sum, and left *absolutely nothing* to represent cargo in any form.

The result of the decision of this Court, however, is to declare its complete jurisdiction over Ward & Co., for all purposes.

We submit, therefore, that the decree should go against Ward & Co. for all of such sums as may be found due for freight, or general average, or both, without reference to, or any deduction on account of, the sums "$910.74 plus $797.65, total $1708.39," (*Opinion*, p. 36), or any of those sums. And that, if Ward & Co. are to be credited with any of these sums, it should be only the sum of $910.74, on account of *cargo only;* for that sum will represent cargo only when the demands of the liens for freight and general average shall have been satisfied by Ward & Co. *Particularly* no credit should be allowed to Ward & Co. on account of the sum of $797.65; for that sum represents expenses which were thrown upon the cargo by the wrongful conduct of Ward & Co. in procuring the sale (Nos. 3545, 3546, pp. 14, 22), and which would not have been incurred had the master of the Eliza Lines been allowed to retain, and carry on, the cargo, as this Court has now decided that he was entitled to do. (*Lootz*, p. 314, X-Q. 13). A further expense of $253.44 has already, on this account, been unnecessarily put upon the vessel by the same wrongful acts of Ward & Co. (Nos. 3545, 3546, p. 22.)

2. It is the gross freight, and not the net freight, for which Ward & Co. should be held answerable.

In dealing with the right of the owner of the ship to *gross* freight, where the voyage has been broken up by the cargo-owner after it has commenced, the Court, while admitting that "there are expressions in various text-books and decisions, leading to" that impression, says: "We do not understand, however, that this has been so expressly determined." (Opinion, pp. 35, 36.) To this point we desire to cite:

The Ship Nathaniel Hooper, 3 Sumner, 542, pp. 555, 560.

Jordan et al. v. *Warren Insurance Co.*, 1 Story, 342, 353-356.

McGaw v. *Ocean Insurance Co.*, 23 Pick. 405, 410, 411.

In the first of the above cited cases STORY, J., held that "there can be no doubt that full freight is due for the whole voyage"; and there is no suggestion in the opinions of STORY, J., nor of SHAW, C. J., in the above cases that any deductions are to be made for the cost of earning it; nor, we submit, has it ever been so decided before this case, *in any case in which the ship has actually performed part of the voyage.*

See, too, *Luke et al.* v. *Lyde*, 3 Burr. 887.
Bork v. *Norton*, 2 McLean, 422.
Hart v. *Shaw*, 1 Cliff. 358, 363.
Clarke et al. v. *Crabtree*, 2 Curtis, 87, 93.
Giles et al. v. *Brig Cynthia*, 1 Peters Adm. Dec. 203, 207.
Bradstreet et al. v. *Baldwin*, 11 Mass. 229, 232.
Palmer et al. v. *Lorillard et al.*, 16 Johns. 346.

It is manifest that in thus directing the Commissioner to ascertain and allow only the net freight, the Court deprives the ship owner of reimbursement for his expenses and outlay in preparing for, and in prosecuting, his voyage,— not only of his estimated expenses from Boston to Montevideo, but also of his *actually incurred expenses at Pensacola, and from Pensacola to Boston;* and the Court thus compels the ship owner to reimburse himself out of his "*net freight*" for the expenses already actually incurred, and his money actually laid out.

3. There should be no deduction of the freight of the Eliza Lines to Lisbon, or of any other freight earned by her.

"And I think the whole of the cases, in which the full freight is upon the ordinary principles of commercial law due, notwithstanding the non-arrival of the goods at the port of destination, may be reduced to the single statement, that the non-arrival has been occasioned by the default or waiver of the merchant shipper. In the former case, the merchant shipper cannot avail himself of his own default to escape from the payment of freight;

in the latter case, he dispenses with the entire fulfilment of the original contract for his own interest and purposes."

STORY, J., *The Ship Nathaniel Hooper*, 3 Sumner, 542, 555.

In this case Ward & Co. desired to re-take their cargo to avoid the "total loss and more" with which Darrach had threatened them (p. 8, above) "if the cargo went forward to Montevideo."

The ordinary rule of reduction of damages has no application to such a case. It certainly ought not to be held that, if the master of a vessel is wrongfully deprived of his cargo by the cargo owner, he ought to recover less freight than if the voyage has been abandoned by waiver on the part of the cargo owner; and there is no authority for asserting that, in the latter case, the master could be required to submit to any deduction from his freight, on account of subsequent voyages undertaken by him.

Underwriters on freight are not entitled to any such credit of the freight of a substituted voyage, and no reason appears why cargo-owners should fare better, or differently.

Jordan et al. v. *Warren Ins. Co.*, 1 Story, 342, 350, 351.
Lord v. *Neptune Ins. Co.*, 10 Gray, 109, 124.
Charleston Ins. & Trust Co. v. *Corner et al.*, 2 Gill (Md.), 410, 428.

4. No credit, in any form, should be made to Ward & Co. of freight's contribution to general average. (Opinion, pp. 36, 37.)

This matter has already been referred to (p. 13 above), and is so fully discussed and explained by the Commissioner, at pp. 272-277 of the Supplemental Report, that no further reference to it is necessary here.

If the Court shall find that no such credit of freight's contribution to general average should be made, the computation under the "Third Step," p. 251 of the Commissioner's Report, should also be revised.

5. Interest should be added to any and all sums found due from Ward & Co.

2 Parsons, S. & A. 490.
Gammell v. *Skinner*, 2 Gall. 45.
Sohier v. *Williams*, 2 Curtis, 195, 198, 199.
The Mary, 1 Sprague, 51, 53.
Greenish v. *Standard Sugar Refinery*, 2 Lowell, 553, 555.
Ricketson v. *Wright et al.*, 3 Sumner, 335, 337, 338.
Lincoln v. *Claflin*, 7 Wall. 132, 139.

The case at bar is a case of contract, not tort.

The Commissioner did not add interest (p. 250), because the Court did not direct it, in reference to the calculations of freight and general average. On p. 37 of the Opinion, however, the Court directs interest on 45 per cent of freight, for a limited period, in favor of the salvors.

6. Bradford Darrach should not be dismissed from the cause.

In the record, Nos. 3545, 3546, Darrach appears as the principal in the stipulation for costs (p. 8), which recites: "And the said Darrach and Spaulding, *submitting themselves to the jurisdiction of this court*," etc.

He signs the claim (pp. 8, 9) in his own name without words of limitation.

He prays an amendment of "his said claim" (p. 15), again in his own name.

Service of the summons to show cause was prayed against him, and, by direction of the Court, was made upon his Proctors (pp. 16-18).

He put in an answer to the petition that freight money be paid into Court (pp. 18-21).

Also, in the record No. 3548, process against Darrach was prayed in the libel, and, again, by direction of the Court, was made upon his Proctors (pp. 3-5).

And Darrach, himself, in his own behalf, filed a motion to dismiss (p. 6).

It is not correct to say (*Opinion*, p. 17) that he "throughout appeared only as the agent of James E. Ward & Co."

There was nothing unusual in the manner in which Darrach first appeared to claim the cargo on behalf of Ward & Co. (Nos. 3545, 3546, pp. 8, 9). The situation is explicitly provided for by Admiralty Rule 9s.

But it is absolutely without precedent in the admiralty practice that such a claimant should be dismissed from the cause, before the termination of the litigation, as directed by the Court (*Opinion*, pp. 17, 38).

No decree can be made, nor execution had, against any other person than Bradford Darrach, upon the stipulation above referred to.

To dismiss him from the cause would inflict serious injury upon the rights of Black, and Andreasen, and those who claim under them, may embarrass them in their recovery against Ward & Co., and may amount to a denial of any recovery whatever.

Neither can any reason be shown why any costs should be awarded him (Opinion, p. 38). There is, nowhere, any decree in his favor. No position taken by him, in the litigation, has been sustained. If he were to be dismissed from the litigation simply on the assumed ground that he has been the agent of Ward & Co. throughout, it is respectfully submitted that all costs should be taxed for or against Ward & Co. The decree should run against Darrach as well as against the members of the firm of Ward & Co.

EDWARD S. DODGE,

Proctor for William W. Black, Libellant, Appellant and Appellee; and for the Banque de Geneve, Libellant, Appellant and Appellee.

JOHN LOWELL,

JAMES A. LOWELL,

Proctors for Hans Andreasen, Claimant, Appellant, Libellant, Appellee.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1902.

THE ELIZA LINES, HER CARGO AND FREIGHT.

No. 368.

HENRY P. BOOTH, APPELLANT,

v.

CATHARINE T. BLACK, ADM'X, ET AL.

No. 369.

CATHARINE T. BLACK, ADM'X, APPELLANT,

v.

BRADFORD DARRACH ET AL.

No. 370.

BANQUE DE GÊNES, APPELLANT,

v.

BRADFORD DARRACH ET AL.

No. 371.

HANS ANDREASEN, APPELLANT,

v.

BRADFORD DARRACH ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE COLT, ALDRICH AND BROWN, J.J.

ORDER OF COURT.

FEBRUARY 4, 1903.

A rehearing is granted upon the following questions:

1. Whether the Circuit Court was in error in directing the deduction of freight's contribution to general average.

2. Whether, if such error existed, the petitioners are now entitled to the correction thereof.

3. Black's Assignments of Error, Second, Fifth, Ninth, Tenth, Eleventh;

Banque's Assignments of Error, Third, Seventh, Eighth;

Andreasen's Assignments of Error, Third, Seventh, Eighth, Ninth, Tenth.

By the Court,

JOHN G. STETSON, *Clerk.*

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE COLT, ALDRICH AND BROWN, JJ.

OPINION OF THE COURT ON REHEARING.

JANUARY 28, 1904.

PER CURIAM. Upon a rehearing of certain points in this case, we find that there is substantial error in the decree of the Circuit Court, due to an erroneous step in the computation of the amount of liability of Ward & Company. In making up this amount, they were credited with the amount of freight's contribution to general average.

This is clearly a credit to which they are not entitled in such computation. We repeat, however, the expression in our former opinion: "It is by no means clear, however, that the preliminary opinion of the Circuit Court justified the commissioner's mode of computation in his first report, or that the alternative report is so clearly correct that we can now adopt it."

In discussing the question of waiver, it was said, in our former opinion, that if the parties had intended to rely upon objections to computations by the commissioner, the point should have been taken at least upon the hearing before the Circuit Court, and in that opinion we acted upon the assumption that the point was not taken there. Upon careful consideration of the arguments on rehearing, it is now made clear that the point was urged before the Circuit Court, and we have reached the conclusion that it would be unjust to treat this question as waived by counsel. Aside from all questions of whether the error arose from the court's direction, or from a misinterpretation of its directions by counsel or commissioner, we think it sufficient to say that in the computations adopted there was an erroneous credit, a plain error, and that counsel were reasonably diligent in their efforts to have this error brought to the attention of the Circuit Court and corrected. That it was presented in the Circuit Court is stated upon the brief for Ward & Company. The error was also before the Circuit Court on the face of the computations of the commissioner's original report, and was amply explained by the commissioner's supplemental report. That it was not corrected as a plain error of accounts was possibly due to the multitude of other details presented to the Circuit Court prior to the entry of its decree. The amount involved is important; and we think that the liberal doctrine upon which this court proceeded in *The Chattahoochie*, 74 F. R. 899, 906, and in *Cuddy* v. *Clement*, 113 F. R. 454, is a sufficient ground for our intervention to cure this error, and that the rights of the parties should not be solely dependent on the application of strict rules of procedure.

~~It is also contended that this error affects the award for salvage.~~ We do not find, however, that this aspect of the matter was so ~~specifically brought to the attention of the commissioner by counsel,~~

or so specifically set forth in the commissioner's report, or so brought to the attention of the Circuit Court, that we are now called upon to notice it. As was said by the learned judge of the Circuit Court, "The ultimate amount which the salvors will receive is the essential thing to be had in mind"; and, under the circumstances, we do not feel required to revise the particulars of the calculations whereby the Circuit Court determined the amount of salvage, or to direct the Circuit Court to make any revision of the salvage award. While the Circuit Court, upon the recommitment of the case which we think necessary, will be at liberty to make any corrections in the decree which it may deem to result necessarily or properly from the correction of the specific error to which we have referred, we find no error affecting the amount of the salvage award which as a matter of right can now be urged in this court as a ground for a modification of the decree.

For Ward & Company it is contended that the error of the deduction of freight's contribution to general average from the total amount of Ward's liability has been substantially cured, for the reason that the decree of the Circuit Court is founded on the assumption that freight's contribution to general average was charged against Ward & Company by being offset against items of credit; in other words, that errors of computation on one side were set off against errors of computation on the other side, and that a balance was struck which the Circuit Court found on the whole reasonable and just. Upon a careful reading of the opinion of the Circuit Court, we find no indication that the item in question was thus used as an offset. On the contrary, by its specification of the general class of errors offset, the opinion seems to negative this conclusion. We find nothing in the opinion that seems to us sufficient to cure the plain error of deducting freight's contribution to general average; and no calculations based upon the evidence or findings of the court are presented to support the contention that this item was in fact included in the balancing of errors.

We are further of the opinion that the Circuit Court did not err in crediting to Ward & Company the proceeds of the cargo. The cargo was their property; and its proceeds were applied by the District and Circuit Courts to the payment of the different claims

against them; and the amount was a just credit in the computation of the total amount of their pecuniary liability. To deny them credit for the item of $797.65 as expenses wrongfully thrown upon the cargo by procuring a sale would be entirely inconsistent with the general mode of computation for determining Ward & Company's liability adopted by the Circuit Court, and carried out by the commissioner.

We are further of the opinion that there was no error of the Circuit Court in its directions as to interest or in its failure to allow interest. This matter rested in the discretion of the court below, and we find no reason to disturb its action. *The Maggie J. Smith*, 123 U. S. 349, 356; *The Albert Dumois*, 177 U. S. 240, 255; *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174.

The remaining question is as to the dismissal of Bradford Darrach from the cause, as a party. By the final decree, judgment was given against him and his sureties for the full amount of his stipulation. We fail to find, in the briefs on rehearing, any specific reason why he should have been retained in the cause, or why the decree should run against him, as well as against the members of the firm of Ward & Company, except possibly the following: "It is not correct to say that he 'throughout appeared only as the agent of James E. Ward & Company'." "Darrach acted throughout as the agent who enabled the wrongful acts of Ward & Company to be accomplished." "Darrach chose to act as the agent of Ward & Company, and he must stand the consequences." The general suggestion of possible but unspecified injuries which might result from his dismissal is too vague, and does not require us to make conjectures as to its specific meaning.

It is apparently suggested that Darrach should be retained as a party whose liability rests upon a tortious or wrongful act; but we think this theory of liability is not tenable. While the order for a sale made by the District Court was erroneous, the procuring of that order was not a tort, and Darrach's participation did not make him a tort feasor. There was an appeal in good faith to a judicial tribunal for the determination of legal rights. The reversal of its decision does not make the parties liable as tort feasors for procuring erroneous action.

"On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost." *Bank of United States* v. *Bank of Washington*, 6 Pet. 817; *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216.

Save as a stipulator, we think that the Circuit Court was right in holding that he "throughout appeared only as the agent of James E. Ward & Company", and in discharging him as a party. Darrach was not a party to the record who had received the benefit of an erroneous judgment. Upon principles of special contract, he was under no obligation other than that for which judgment has been given against him. Upon principles of tort, he is not liable, as he was not a tort feasor; and the obligation to make restitution arising under the doctrine of the cases cited is an obligation implied by law upon equitable principles. It is unnecessary to consider how far the principle that, upon the reversal of an erroneous judgment, there should be indemnity, would give rise to an obligation of an agent who represented an irresponsible principal, since the record raised no question of this character. The Circuit Court imposed the obligation where it ultimately belonged, upon Ward & Company, and consistently with the reasoning which led to that result, and in the absence of any apparent reason for further retaining a party who had appeared merely on behalf of his principals who had subsequently intervened, dismissed him and held the principals. We find no error here.

The case is remanded to the Circuit Court, with directions to that court to revise the amount of the judgment against James E. Ward & Company by disallowing the personal credit to them of freight's contribution to general average, and to award against said James E. Ward & Company, in addition to the several sums already awarded against them in the decree of the Circuit Court, $1525.43, *the amount of said credit, together with interest thereon from May* 12, 1899; *forty-five per cent of which amount and interest is to be recovered by Catharine T. Black, Administratrix, in behalf of herself and the other part-owners of the schooner Edward E. Barrett, and the remaining fifty-five per cent and interest is to be recovered by the Banque de Gênes and Hans Andreasen; said amount of fifty-five*

per cent and interest, however, to be subject to the priorities as between said Banque de Gênes and Hans Andreasen, already provided in the decree of the Circuit Court. In other respects, the decree of the Circuit Court is affirmed; neither party to recover costs in this court.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1903.

Nos. 368, 369, 370 and 371.

THE ELIZA LINES, HER CARGO AND FREIGHT.

FINAL DECREE IN CIRCUIT COURT OF APPEALS.

JANUARY 28, 1904.

This cause came on to be further heard on November 11, 1903, under the order of court entered February 4, 1903, granting a rehearing on certain questions stated in the order, and was further argued by counsel.

On consideration whereof, it is now, to wit, January 28, 1904, here ordered, adjudged and decreed as follows: —

The case is remanded to the Circuit Court, with directions to that court to revise the amount of the judgment against James E. Ward & Company, by disallowing the personal credit to them of freight's contribution to general average, and to award against said James E. Ward & Company, in addition to the several sums already awarded against them in the decree of the Circuit Court, $1525.43, the amount of said credit, together with interest thereon from May 12, 1899; forty-five per cent of which amount and interest is to be recovered by Catharine T. Black, Administratrix, in behalf of herself and the other part-owners of the schooner Edward E. Barrett, and the remaining fifty-five per cent and interest is to be recovered by the Banque de Gênes and Hans Andreasen; said amount of fifty-five per cent and interest, however, to be subject to the priorities as between said Banque de Gênes and Hans Andreasen, already

provided in the decree of the Circuit Court. In other respects, the decree of the Circuit Court is affirmed; neither party to recover costs in this court.

By the Court,

JOHN G. STEVENS, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1903.

Nos. 669, 670, 670 and 671.

THE ELSEA LYKES, HER CARGO AND FREIGHT.

CERTIFICATE OF CLERK OF CIRCUIT COURT OF APPEALS.

I, John G. Stetson, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify (1) that the printed pages numbered 7 to 831, herein prefixed, contain and are a true copy of the Transcripts of Record of the Circuit Court of the United States for the District of Massachusetts, filed in said cause on January 11, 1901, and March 26, 1901.

I further certify (2) the printed pages numbered 477 and 478, herein prefixed, contain and are a true copy of a Mot[illegible] to Dismiss the Appeal of Henry P. Booth, filed in said cause on April 16, 1901.

I further certify (3) that the printed pages numbered 832 to 838, herein prefixed, contain and are a true copy of the Opinion of the said Circuit Court of Appeals, passed down on February 13, 1902, and (4) that printed page 839, herein prefixed, contains and is a true copy of the Decree of said Circuit Court of Appeals, entered in said cause on February 13, 1902.

I further certify (5) that the printed pages numbered 840 to 846, herein prefixed, contain and are a true copy of the Petition for Rehearing filed in said cause by Catherine T. Bush, Administratrix, &c. Banque de Gêmes and Blake Anderson on April 25, 1902, and (6) that the printed pages numbered 847 and 848, herein prefixed, contain and are a true copy of the Order of said Circuit Court of Appeals granting a rehearing, entered on February 6, 1903.

I further certify (7) that the printed pages numbered 459 to 463, hereto prefixed, contain and are a true copy of the Opinion of the said Circuit Court of Appeals passed down on January 28, 1904, and (8) that the printed pages 465 and 466, hereto prefixed, contain and are a true copy of the Final Decree of said Circuit Court of Appeals entered in said cause on January 28, 1904.

I further certify (9) that said printed pages numbered 7 to 466, hereto prefixed, contain and are a true copy of the record and all proceedings in said cause in said Circuit Court of Appeals to and including March 15, 1904, and (10) that a mandate has not issued in said cause.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit at Boston in said First Circuit, this fifteenth day of March, A. D. 1904.

[SEAL] JOHN G. STETSON, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the first circuit, Greeting:

Being informed that there is now pending before you a suit entitled the "Eliza Lines," her cargo and freight, wherein are four appeals entitled Henry P. Booth, appellant, and Catharine T. Black, administratrix, *et al.*, No. 368; Catharine T. Black, administratrix, appellant, and Bradford Darrach *et al.*, No. 369; Banque de Genes, appellant, and Bradford Darrach *et al.*, No. 370; and Hans Andreasen, appellant, and Bradford Darrach *et al.*, No. 371, which suit was removed into the said circuit court of appeals by virtue of appeals from the circuit court of the United States for the district of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of April, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 19,278. Supreme Court of the United States. No. 627, October term, 1903. Henry P. Booth, surviving partner, &c., *vs.* The Norwegian Bark "Eliza Lines," &c. Writ of certiorari, and return thereon of the United States circuit court of appeals for the first circuit. Filed May 9, 1904.

Supreme Court of the United States, October Term, 1903. In Admiralty.

HENRY P. BOOTH, Surviving Partner, &c.,
v.
BARK ELIZA LINES, HER CARGO AND FREIGHT.

Stipulation.

It is agreed that the certified transcript of record on file in the above entitled cause may be taken as a return to the writ of *cer-*

tiorari issued out of this court in the same, dated the nineteenth day of April, A. D. 1904, to the judges of the United States circuit court of appeals for the first circuit.

LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
Proctors for Henry P. Booth, Surviving Partner, and for Bradford Darrach.
EDWARD S. DODGE,
Proctor for Catharine T. Black, Administratrix, and for Banque de Gênes.
JOHN LOWELL,
JAMES A. LOWELL,
Proctors for Hans Andreasen.

Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now here the judges of the United States circuit court of appeals for the first circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of *certiorari* issued that the certified transcript of record on file in the office of the clerk of the Supreme Court of the United States may be taken as a return to this writ of *certiorari*.

In testimony whereof I, John G. Stetson, clerk of said United States circuit court of appeals for the first circuit, hereto set my hand and affix the seal of said court at Boston, in said first circuit, this third day of May, 1904.

[Seal United States Circuit Court of Appeals, First Circuit.]

JOHN G. STETSON, *Clerk.*

Supreme Court of the United States, October Term, 1904.

HENRY P. BOOTH, Surviving Partner, &c.,
vs.
THE NORWEGIAN BARK "ELIZA LINES" ET AL. } No. 213.

On consideration of the petition for a cross writ of certiorari herein,

It is ordered by the court that said petition be, and the same is hereby, granted.

October 17, 1904.

[Endorsed:] File No. 19,278. Supreme Court of the United States, October term, 1904. Term No. 213. Order. Filed Oct. 17, 1904.

FILE COPY.

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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1903.

THE ELIZA LINES, HER CARGO AND FREIGHT.

THE PETITION OF

HENRY P. BOOTH

For a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

For the Petitioner,
L. S. DABNEY.
F. CUNNINGHAM.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

IN ADMIRALTY.

THE ELIZA LINES, HER CARGO AND FREIGHT.

THE PETITION OF HENRY P. BOOTH, SURVIVING PARTNER OF THE FIRM OF JAMES E. WARD & COMPANY, FOR A WRIT OF *CERTIORARI* TO BE DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, TO BRING BEFORE THIS HONORABLE COURT THE CONSOLIDATED CAUSE THERE PENDING, ENTITLED

THE ELIZA LINES, HER CARGO AND FREIGHT.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Henry P. Booth, surviving partner of the firm of James E. Ward & Company, respectfully represents:

First: Your petitioner is sole surviving partner of the firm of James E. Ward, Henry P. Booth and William H. T. Hughes, formerly doing business in the city of New York in the state of New York as co-partners, under the firm name and style of James E. Ward & Company.

Second: On September 16, 1889, the Norwegian bark Eliza Lines, laden with a cargo of lumber, her masts gone and ten or twelve feet of water in her hold, was found floating abandoned and derelict on the high seas, about seventy to seventy-five miles southeast of Nantucket, by the New York pilot boat, Edward E. Barrett, William W. Black, master and managing part

owner, taken possession of and towed into Boston, where she arrived on September 19, 1889.

Third: The Eliza Lines under command of Hans Andreasen, master, had sailed August 9, 1889, from Pensacola, Florida, with her cargo of lumber, bound on a voyage to Montevideo under a charter party dated February 15, 1889, to said James E. Ward & Company, and to the performance of the charter party the said charterers and the owners of said bark had respectively bound themselves, "the dangers of the seas, fire and navigation always mutually excepted." This charter party is found on pp. 35 and 36 of the record. Hans Andreasen, the master of the bark, had signed bills of lading acknowledging the receipt of the cargo in good order and condition to be delivered, "the dangers of the seas only excepted," at Montevideo to Thomas Drysdale & Company or assigns, "he or they paying freight for the said as per charter party with average accustomed." Drysdale & Company, the consignees, had no interest in the cargo which belonged to Ward & Company, and the cost price of which at Pensacola was $3460.77. The bark in the course of her voyage encountered violent storms and heavy seas, lost her bulwarks, became leaky and unmanageable, her masts were cut away and part of her deck cargo was jettisoned for the preservation of the bark and cargo, and on September 11, 1889, the master and crew abandoned her and, at the request of Captain Andreasen, were taken off by a sailing vessel, to which they had made signals of distress and which landed them at Port Maitland, Nova Scotia, on September 16, 1889. From Port Maitland the master went with his officers and crew to Yarmouth, where he communicated with the Swedish Consul and telegraphed to his owners. Receiving no reply or communication at Yarmouth they proceeded to St. John, N. B. There

the master received a telegram from his owners informing him that the bark had been towed into Boston and directing him to proceed thither, in obedience to which he went to Boston and arrived there on September 21, 1889. The master in his deposition taken in the cause testified that, when he arrived in Boston, he did not have the intention of repairing his vessel and carrying on his cargo to Montevideo, but he formed that intention a short time after arrival when he had taken in the situation. He also testified that when he abandoned his vessel at sea it was without any intention of returning to her or expectation of ever seeing her again.

Fourth: The salvors remained in possession of the vessel and cargo at Boston until September 26, 1889, (*Transcript*, pp. 30, 31 cross ints. 91, 92, 95, 102 and p. 77) when they filed a libel for salvage in the United States District Court for the District of Massachusetts against bark, cargo and freight, and on the same day the marshal upon process issued upon this libel, took possession of the bark and her cargo.

Fifth: Prior to the filing of this libel, Ward & Company and the master were respectively seeking and demanding from the salvors possession of the cargo, and each was forbidding them to deliver it to the other. (*Transcript*, p. 109.)

On September 27, 1889, the master filed his claim in the salvage suit praying for the delivery to him of the bark and cargo on stipulation, and on the same day Bradford Darrach, as the agent and on behalf of Ward & Company, filed their claim in the salvage suit praying that the cargo be delivered to them upon stipulation without the payment of any freight. On October 5, 1889, the vessel was delivered to the master upon stipulation. On October 18, 1889, the master filed in Court in the salvage suit a motion that the cargo be

delivered to him upon stipulation, and on the same day James E. Ward & Company, by their agent Darrach and their proctor, filed in Court in the salvage suit a motion that the cargo be sold, setting forth that the value of it was being rapidly diminished by reason of the charges of custody and other costs and expenses. On the same day a hearing was had before the District Judge on these claims and motions, and on November 16, 1889, the judge denied the motion of the master for delivery to him of the cargo and ordered the same to be sold at public auction on November 29, 1889. On November 19, 1889, a warrant for the sale of the cargo issued from the Court in the salvage suit to the marshal, and pursuant thereunto the cargo was sold at public auction by the marshal November 29, 1889, and the net proceeds of the sale paid into the registry of the Court where they have since remained. November 27, 1889, the salvors filed in Court in their suit a petition that Ward & Company be required to bring into Court the chartered freight to answer to the exigency of the suit. January 16, 1891, the Court permitted the salvors to file a motion in their suit as of November 27, 1889, praying the Court to order the freight money to be paid into Court, and to order Ward & Company to file stipulation to pay said freight money into Court or such portion of it as the Court might order, and until such stipulation should be given the Court would rescind and restrain the warrant for the sale of the cargo, and would order said sale abandoned if no stipulation should be given, and on the same day this motion was disallowed by the Court as of November 27, 1889.

Sixth: On October 18, 1889, Ward & Company filed in the District Court their libel in a cause of possession against the cargo and against all persons lawfully

intervening, praying that the cargo be delivered to them. No process ever issued on this libel, but on November 29, 1889, Andreasen, the master of the bark, volunteered to appear and file a claim and answer. On February 27, 1890, Ward & Company moved for an order that this libel be dismissed as of November 19, 1889, upon the ground that on that day a warrant had issued for the sale of the cargo, and this motion was allowed by the Court January 16, 1891 and a decree was then entered dismissing the libel as of November 19, 1889. From this decree the master appealed to the Circuit Court.

Seventh: Sundry other libels, petitions and motions not here material to be detailed were, after the order for sale, filed in the District Court, including a libel filed against the cargo and against Ward & Company by the master to recover the chartered freight and a general average loss, and a libel filed against bark and freight by the Banque de Gênes upon a bottomry bond given by the master on bark and freight at Pensacola.

Eighth: The District Court ruled and held that upon the facts stated at the hearing, the bark having been abandoned at sea by the master and crew without any intention of retaking possession, the cargo owner had a right to treat the contract of affreightment as at an end, and that the only remaining interest of the ship owner in the cargo was a claim for *pro rata* freight and for any general average contribution. That Court accordingly made decrees against the proceeds of the cargo in the registry for salvage, freight and bottomry, which exhausted the whole fund leaving nothing for the owner of cargo, but held that Ward & Company were under no further liability, and refused to make any decree against them personally. From the decrees of the District Court the salvors, master and bottomry bond-

holder all appealed to the Circuit Court. Ward & Company took no appeal from any of the decrees of the District Court.

Ninth: The Circuit Court ordered all the libels and proceedings to be consolidated and to be carried along, disposed of and recorded in that Court as a single cause under the title of "The Eliza Lines, her Cargo and Freight," and upon hearing ruled and held:

That the justifiable abandonment at sea of the bark and cargo by the master and crew under stress of a peril mutually excepted in the contract of affreightment, without any intention of returning and retaking them, thus leaving the same derelict upon the high seas, does not entitle Ward & Company when bark and cargo have afterwards been saved and brought into port by salvors and libelled for salvage, and before the master or carrier has regained possession of the cargo, to treat the contract of affreightment as abandoned and at an end, and without payment of freight to receive the cargo from the Court upon stipulation, or to procure the sale of it by the Court.

Also that the carrier in these circumstances still has the right, against the will and objection of Ward & Company, to claim the cargo, receive it upon stipulation and to complete the original voyage.

Also that if the owner of cargo in these circumstances prevents the carrier from regaining possession of the cargo, the owner of cargo, although he receives possession of it from the salvor or the Court and not from the carrier, is nevertheless liable to the carrier for the net freight that would have been earned under the contract of affreightment, if the voyage had been completed.

Also that the District Court erred in ordering a sale of the cargo of the Eliza Lines; that this order having been made upon the motion of Ward & Company mus

be deemed to have been made solely in their interest and not in the interest of any other of the parties; that the master having been by this sale prevented from obtaining possession of the cargo and the voyage thereby broken up, Ward & Company must answer for these consequences and are liable for the net freight which would have been earned under the charter party by the completion of the original voyage and also for general average.

And sent the case to a commissioner to compute freight and general average upon these principles.

Tenth: Upon the coming in of the commissioner's report the Circuit Court made a decree against the proceeds in the registry for salvage, freight, general average and bottomry, which exhausted the whole proceeds in the registry, and in addition thereto made a decree against Ward & Company personally for sundry sums in satisfaction of salvage, freight, general average and bottomry, amounting in the whole to $1585.29, together with the further sum of $468.58 for interest and for costs amounting to $1702, being in the whole $3755.87 in excess of the whole net proceeds in the registry received from the sale of cargo. From this decree all parties appealed to the Circuit Court of Appeals.

Eleventh: The Circuit Court of Appeals ruled and held the law to be as held in the Circuit Court and set forth in the preceding paragraph numbered *Ninth;* ordered the Circuit Court to correct its decree by disallowing a credit of $1525.43, which had been allowed to Ward & Company in the computation of freight and general average in that Court, and to charge Ward & Company personally with said sum of $1525.43, together with interest on the same from May 12, 1899, and to award forty-five per cent of this additional sum with interest to the salvors and fifty-five per cent thereof

with interest to the Banque de Gênes and Hans Andreasen, and in all other respects affirmed the decree of the Circuit Court. The decree of the Circuit Court of Appeals thus added $1525.43, and interest to the sums decreed against Ward & Company personally in the Circuit Court, thus making the total amount for which Ward & Company are held to be personally liable in addition to the entire net proceeds of the sale of their cargo in the registry to be the sum of $5281.30, including costs with some additional interest.

Twelfth: The question of the respective rights of cargo owner and ship owner when a ship and cargo, which have been abandoned at sea without any intention of returning, by the master and crew under stress of a peril excepted in the contract of affreightment, have been afterwards found and brought into a port of safety by salvors, upon which question the Circuit Court and Circuit Court of Appeals overruled the decision of the District Court, is a grave and important question of commercial law of the utmost interest to all persons engaged in commerce and navigation. By the settled law of England the ship owner in such circumstances has the right while, as in this case, the cargo remains in the possession of the salvor or of the Court upon a libel for salvage, to treat the abandonment of ship and cargo at sea as an abandonment by the carrier of the contract of affreightment and to receive possession of his cargo from the salvor or from the Court without the payment of any freight whatever. If the Eliza Lines had been taken by the salvors into a port in New Brunswick or Nova Scotia, or other English port, instead of into Boston, this right could have been exercised by Ward & Company without subjecting themselves to any personal liability. The decision of the District Court was made upon the authority of the English

decisions and of several prior decisions of other courts in this country both State and Federal, to be cited in the brief to be presented with this petition. The decision of the Circuit Court and Circuit Court of Appeals, it is respectfully believed, has no support from any express decision in either England or in this country.

And your petitioner respectfully shows that the rulings and decision of the said Circuit Court and of the said Circuit Court of Appeals as stated and set forth in the foregoing *ninth* and *eleventh* paragraphs of this petition, are erroneous, and ought to be brought before this Honorable Court for correction; that said Circuit Court of Appeals should have ruled and held that by the abandonment of the Eliza Lines and her cargo upon the high seas by her master and crew under stress of a peril mutually excepted in the charter party, without intention of returning to her, the ship owner, so far as he could, abandoned the contract of affreightment and gave the right to the charterer to treat the contract of affreightment as abandoned and at an end, and to obtain possession of his cargo from the salvor or from the Court without payment of freight; and should further have held that Ward & Company were not answerable for the consequences of the sale by the District Court of the cargo even if it were erroneous, or for the breaking up of the voyage thereby; and should further have held that Ward & Company are not liable to any decree against them personally, or liable in any way for any amount in excess of the proceeds of the sale of their cargo in the registry of the Court.

And your petitioner presents herewith a certified copy of the entire record of the said case in the Circuit Court of Appeals.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of

this Honorable Court to be directed to the said United States Circuit Court of Appeals for the First Circuit, commanding said Circuit Court of Appeals to certify and to send to this Court on a day certain to be therein named, a full and complete transcript of the record and of all the proceedings of said Court of Appeals in this cause which is entitled in that Court,

"THE ELIZA LINES, HER CARGO AND FREIGHT,"

wherein are four appeals from the decree of the Circuit Court numbered and entitled as follows:

No. 368. Henry P. Booth, Appellant, v. *Catharine T. Black, Administratrix, et al.*

No. 369. Catharine T. Black, Administratrix, Appellant, v. *Bradford Darrach, et al.*

No. 370. Banque de Gênes, Appellant, v. *Bradford Darrach, et al.*

No. 371. Hans Andreasen, Appellant, v. *Bradford Darrach, et al.*

to the end that said cause may be reviewed and determined by this Honorable Court as provided by law; that the said decree of said Circuit Court of Appeals may be reversed by this Honorable Court; that it may be adjudged and determined by this Honorable Court that said James E. Ward & Company are not liable to the libellants or to any of them, or to any party in this cause, for anything beyond and in excess of the proceeds in the registry of the sale of their cargo; that no decree shall be made against said Ward & Company personally in the premises, but so far as concerns said Ward & Company shall be made only against said proceeds in the registry; and that your petitioner may have

such other and further relief or remedy in the premises as to this Court may seem appropriate.

HENRY P. BOOTH.

STATE OF FLORIDA, }
COUNTY OF DADE. } ss.

On this seventh day of March, in the year 1904, before me, a notary public, within and for said County of Dade, personally appeared Henry P. Booth and made oath that he has read the foregoing petition by him subscribed, and knows the contents thereof, and that the allegations thereof are true, as he verily believes, and that it is not intended for delay.

Witness my hand and notarial seal the day and year above written.

L. S. MITCHELL,
Notary Public.

HENRY P. BOOTH.

{ NOTARY'S SEAL }

My Commission Expires
January 25th, 1908.

STATE OF FLORIDA, }
COUNTY OF DADE. }

I, E. C. Dearborn, Clerk of the Circuit Court in and for said County of Dade, State of Florida, the same being a Court having a Seal, do hereby certify that L. A. Mitchell, by whom the foregoing acknowledgment was taken, and whose name is subscribed thereto, was, at the time of taking the same, a Notary Public residing in said County, duly commissioned and sworn, and authorized by the laws of said State to take the proof or acknowledgment of deeds and other instruments in writing (to be recorded therein) and to administer oaths or affirmations in said County; and that I am well acquainted with his hand-writing, and verily believe

that the signature of the foregoing certificate is his genuine signature.

In Witness Whereof, I have hereunto set my hand and affixed my official Seal, which is the Seal of said Court at Miami, Florida, this seventh day of March, A. D. 1904.

{ CIRCUIT COURT SEAL }

E. C. DEARBORN,
Clerk Circuit Court.

I, Lewis S. Dabney, hereby certify that I am an attorney and counsellor at law, admitted to practice in the Supreme Court of the United States; that I have examined the foregoing petition for a writ of *certiorari* subscribed by Henry P. Booth; that the same is not intended for the purpose of delay, and that in my opinion the petition is meritorious and well founded in point of law, and the case a proper one for the writ to issue.

LEWIS S. DABNEY.

APR 7 1904
JAMES H. McKENNEY,
Clerk.

[COPY]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

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IN ADMIRALTY.

No. ~~368~~ 243.

THE ELIZA LINES, HER CARGO AND FREIGHT.

HENRY P. BOOTH,

Surviving partner, &c.

PETITIONER FOR WRIT OF *certiorari*.

MOTION.

And now comes the said Henry P. Booth, petitioner, by his proctors, Lewis S. Dabney and Frederic Cunningham, and moves for a writ of *certiorari* to be directed to the Judges of the United States Circuit Court of Appeals for the First Circuit, commanding them to certify and return to this Court the whole record and all the proceedings had in the consolidated cause in admiralty lately heard before them, entitled

THE ELIZA LINES, HER CARGO AND FREIGHT,

wherein are four appeals, numbered and entitled respectively:

No. 368, HENRY P. BOOTH, *Appellant*, v. CATHARINE T. BLACK, *Administratrix*, ET AL.

No. 369, CATHARINE T. BLACK, *Administratrix*, *Appellant*, v. BRADFORD DARRACH ET AL.

No. 370, BANQUE DE GÊNES, *Appellant*, v. BRADFORD DARRACH ET AL.

No. 371, HANS ANDREASEN, *Appellant*, v. BRADFORD DARRACH ET AL.

LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
Proctors for Petitioner.

[OVER]

[Copy]

SUPREME COURT OF THE UNITED STATES.

October Term, 1903. In Admiralty

No. 627.

THE ELIZA LINES, HER CARGO AND FREIGHT.

Henry P. Booth,

Surviving partner, &c.

Petitioner for writ of *Certiorari*.

NOTICE.

Please take notice that on Monday, the eleventh day of April, 1904, at the opening of the Court at the Capitol in the City of Washington on that day, or as soon thereafter as counsel can be heard, a motion will be made and submitted to the Court upon the petition in the above entitled cause filed and docketed as above set forth, of which motion the foregoing is a true copy.

LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
Proctors for Petitioner.

Boston, March 28, 1904.

To Edward S. Dodge, Esquire,
Proctor for Catharine T. Black, *Administratrix*, and for Banque de Gênes,

Messrs. John Lowell and James A. Lowell,
Proctors for Hans Andreasen,

Messrs. Lewis S. Dabney and Frederic Cunningham,
Proctors for Bradford Darrach.

BOSTON, March 28, 1904.

Due and sufficient service of the foregoing notice is hereby acknowledged.

EDWARD S. DODGE,
Proctor for CATHARINE T. BLACK, *Administratrix*, and for BANQUE DE GÊNES.

JOHN LOWELL,
JAMES A. LOWELL,
Proctors for HANS ANDREASEN.

LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
Proctors for BRADFORD DARRACH.

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IN ADMIRALTY.

No. 604. 8643

THE ELIZA LINES, HER CARGO AND FREIGHT.

Henry P. Booth, Surviving Partner &c.
PETITIONER FOR WRIT OF CERTIORARI.

BRIEF FOR PETITIONER.

L. S. DABNEY,
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of Counsel.

SUPREME COURT OF THE UNITED STATES.

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BRIEF FOR THE PETITIONER.

I.

CONCISE STATEMENT OF THE CASE.

The Norwegian bark, Eliza Lines, Hans Andreasen master, bound on a voyage from Pensacola, Florida, to Montevideo, with a cargo of lumber under charter party containing the stipulation "the dangers of the seas, fire and navigation always mutually excepted" to James E. Ward & Company of New York, of which firm the petitioner is surviving partner, encountered violent storms and heavy seas, lost her bulwarks, became leaky and unmanageable, her masts were cut away, and part of the deck cargo was jettisoned for the preservation of the bark and cargo, and was finally abandoned at sea, some seventy to seventy-five miles southeast of Nantucket, by her master and crew without any intention of returning to her or expectation of ever seeing her

again. The master and crew were taken off at the request of Captain Andreasen by a sailing vessel, to which they had made signals of distress. The bark after floating round derelict for several days was found and picked up by the New York pilot boat Edward E. Barrett, William W. Black master and managing part owner, taken possession of and towed into Boston, arriving there at 2 A. M. September 19, 1889. The master was landed in Nova Scotia, whence he made his way to St. John, N. B. where he received a telegram from his owners informing him that the bark had been towed into Boston and directing him to proceed thither, in obedience to which he went to Boston and arrived there late in the evening of September 21. He testified in his deposition taken in the cause that, when he abandoned his vessel at sea, it was without any intention of returning to her or expectation of ever seeing her again, and that, when he arrived in Boston, he did not have the intention of repairing his vessel and carrying on his cargo to Montevideo, but formed that intention a short time after arrival in Boston when he had taken in the situation.

Ward & Company and the master respectively sought and demanded from the salvors possession of the cargo, who retained possession of it until they filed their libel hereinafter mentioned, and each of them forbade the delivery of it to the other; and thereupon September 26, 1889, the salvors filed their libel for salvage in the United States District Court for the District of Massachusetts against bark, cargo and freight, and on the same day the marshal upon a warrant issued upon this libel took possession of the bark and her cargo.

On the next day the master filed a claim praying for the delivery to him of the bark and cargo upon stipulation, and on the same day Ward & Company filed their

claim praying that the cargo be delivered to them upon stipulation without the payment of any freight. October 5, 1889, the vessel was delivered to the master upon stipulation. October 18 the master filed a motion that the cargo be delivered to him upon stipulation, and on the same day Ward & Company filed a motion that the cargo be sold, setting forth that the value of it was being rapidly diminished by reason of the charges of custody and other costs and expenses, and on the same day hearing was had before the district judge on these claims and motions. November 16, 1889, the judge denied the motion of the master for delivery to him of the cargo, and ordered the same to be sold at public auction on November 29. November 29 the cargo was sold at public auction by the marshal and the net proceeds of the sale paid into the registry of the court, where they have since remained. November 27 the salvors filed in court a petition that Ward & Company be required to bring into court the chartered freight to answer to the exigency of the suit, and January 16, 1891, they were allowed by the court to file a motion as of November 27, 1889, that the freight money be paid into court, and that Ward & Company be ordered to file a stipulation to pay it into court, or such portion of it as the court might order, and that the court would rescind and restrain the warrant for sale until such stipulation be given and would order the sale abandoned if no stipulation should be given. On the same day this motion was disallowed by the court as of November 27, 1889.

October 18, 1889, Ward & Company filed a libel for possession against the cargo. No process ever issued on this libel but the master of the bark volunteered to appear and file a claim and answer. February 27, 1890, Ward & Company filed a motion that this libel be

dismissed as of November 19, 1889, upon the ground that on that day a warrant had issued for the sale of the cargo. This motion was afterwards allowed by the court and the libel dismissed as of November 19, 1889, and from the decree dismissing it the master appealed to the Circuit Court.

After the order of sale, sundry other libels, petitions and motions, detailed description of which is here unnecessary, were filed; among them a libel by the master against cargo and against Ward & Company to recover the chartered freight and a general average loss, and a libel against bark and freight by the Banque de Gênes upon a bottomry bond given by the master on the bark and freight at Pensacola.

The District Court ruled and held, that the bark having been abandoned at sea by the master and crew without any intention of retaking possession, Ward & Company had a right to treat the contract of affreightment as at an end, and that the only remaining interest of the shipowner in the cargo was a claim for *pro rata* freight and for general average; and made decrees against the proceeds of the cargo in the registry for salvage, *pro rata* freight and bottomry, which exhausted the whole fund leaving nothing for the owner of cargo; but held that Ward & Company were under no further liability, and refused to make any decree against them personally. From the decrees of the District Court the salvors, master and bottomry bondholder all appealed to the Circuit Court, but Ward & Company took no appeal from any of the decrees of the District Court.

The Circuit Court after ordering all the libels and proceedings to be consolidated and to be carried along, disposed of and recorded in that court as a single cause,

under the title of "The Eliza Lines, her Cargo and Freight," ruled and held:

1. That the justifiable abandonment at sea of the bark and cargo by the master and crew under stress of a peril mutually excepted in the contract of affreightment, without any intention of returning and retaking them, thus leaving the same derelict on the high seas, did not entitle Ward & Company when bark and cargo had afterwards been saved and brought into port by salvors and libelled for salvage, and before the master or carrier had regained possession of the cargo, to treat the contract of affreightment as abandoned and at an end, and without payment of freight to receive the cargo from the court upon stipulation or to procure the sale of it by the court.

2. That the carrier, in these circumstances, still had the right against the will and objection of Ward & Company to claim the cargo, receive it upon stipulation and to complete the original voyage.

3. That Ward & Company, in these circumstances, having prevented the carrier from regaining possession of the cargo, although they received possession of it from the salvor or from the court and not from the carrier, are nevertheless liable to the carrier for the net freight that would have been earned under the contract of affreightment if the voyage had been completed.

4. That the District Court erred in ordering a sale of the cargo of the Eliza Lines; that this order having been made upon the motion of Ward & Company must be deemed to have been made solely in their interest, and not in the interest of any other of the parties; that the master having been by this sale prevented from obtaining possession of the cargo and the voyage thereby broken up, Ward & Company must answer for these consequences and are liable for the net freight, which would

have been earned under the charter party by the completion of the original voyage and also for general average.

The case was thereupon sent to a commissioner to compute freight and general average upon these principles; and upon his report the Circuit Court made a decree against the proceeds in the registry for salvage, freight, general average and bottomry, which exhausted the whole fund, and in addition thereto made a decree against Ward & Company personally for salvage, freight, general average, bottomry, interest and costs amounting in the whole to $3755.87 in excess of the whole net proceeds in the registry received from the sale of cargo. From this decree all parties appealed to the Circuit Court of Appeals.

The Circuit Court of Appeals ruled and held the law to be as held in the Circuit Court and set forth in the preceding paragraphs numbered in the margin respectively 1, 2, 3 and 4; ordered the Circuit Court to correct its decree by disallowing a credit, which had been allowed to Ward & Company in the computation of freight and general average, to charge Ward & Company personally with the additional amount with interest from May 12, 1899; to award forty-five per cent. of the additional sum with interest to the salvors, and fifty-five per cent. thereof with interest to the Banque de Gênes and Hans Andreasen, and in all other respects affirmed the decree of the Circuit Court. By this decree of the Circuit Court of Appeals, Ward & Company are held personally liable, in addition to the entire net proceeds of the sale of their cargo in the registry, for the sum, including costs, of $5281.30, with some additional interest.

II.

SPECIFICATION OF THE ERRORS RELIED UPON.

The Circuit Court of Appeals erred:

1. Because the Court held that the justifiable abandonment of the bark and cargo at sea by the master and crew under stress of a mutually excepted peril, without any intention of returning and retaking them, thus leaving the same derelict upon the high seas, did not entitle Ward & Company when bark and cargo had been saved and brought into port by salvors, and before the master or carrier had regained possession of the cargo, to treat the contract of affreightment as abandoned and at an end, and without payment of freight to receive the cargo from the court upon stipulation or to procure the sale of it by the court.

2. Because the court held that the carrier, in these circumstances, still had the right, and was entitled to insist upon it against the will and objection of Ward & Company, to claim the cargo, receive it upon stipulation and to complete the original voyage.

3. Because the court held that, because Ward & Company, in these circumstances, prevented the carrier from regaining possession of the cargo, although they did not receive possession of it from the carrier or from the master, they are nevertheless liable to the carrier for the net freight that would have been earned under the contract of affreightment if the voyage had been completed.

4. Because the court held that, because the District Court erred in ordering a sale of the cargo of the Eliza Lines, this order having been made upon the motion of Ward & Company must be deemed to have been made solely in their interest and not in the interest of any of

the other parties; that the master having been prevented by the sale from regaining possession of the cargo, and the voyage thereby being broken up, Ward & Company must answer for these consequences and are liable personally for the freight that would have been earned under the charter party on completion of the voyage, and also for general average.

5. Because said court held that the sale of said cargo was not a sale for necessity under Admiralty Rule No. 10, and was not made in the exercise of its lawful discretion by the District Court in the interest of all parties for the reason set forth in the motion for sale, to wit, that the value of said cargo was being rapidly diminished by reason of the charges of custody and other costs and expenses.

6. Because the court held that the several claims for salvage, average, freight and bottomry were not confined for their satisfaction to the proceeds in the registry of the sale of the cargo, but that Ward & Company were personally still further liable, and because the court made a decree against Ward & Company personally.

7. Because the decree of the court for the satisfaction of the claims for salvage, average, freight and bottomry is not confined to the proceeds in the registry of the sale of the cargo, but in addition thereto condemns Ward & Company personally to the payment of an additional amount.

III.

BRIEF OF THE ARGUMENT.

1. THE CASE ONE WHICH SHOULD BE REVIEWED ON WRIT OF CERTIORARI.

It is a case pending in the Circuit Court of Appeals and one in which the decision of that court is made

final unless thus reviewed. The decree entered by the Court of Appeals is a final decree. The correction, which it directs, of the decree of the Circuit Court appealed from imposes merely a ministerial duty and does not involve the performance of judicial functions.

Beebe v. *Russell*, 19 How. 283.
Keystone Iron Co. v. *Martin*, 132 U. S. 91, 95.
McGourkey v. *Toledo & Ohio Railway*, 146 U. S. 536, 549.

Therefore, while the power of the court is undoubted to issue the writ at any time while the case is pending in the Court of Appeals, the exercise of that power is not here sought in a matter of private interest until there has been a final decree in the Court of Appeals.

Chicago & Northwestern Railway v. *Osborne*, 146 U. S. 354.
American Construction Co. v. *Jacksonville &c. Railway*, 148 U. S. 372.
Forsyth v. *Hammond*, 166 U. S. 506
Pierce v. *Tenn. Coal & R. R. Co.* 173 U.S. 1.

The question presented of the respective rights of cargo owner and ship owner, when a ship and cargo, which have been abandoned at sea without any intention of returning by the master and crew under stress of a peril mutually excepted in the contract of affreightment, have been afterwards found and brought into a port of safety by salvors, while possession of it remains in the salvors and in the court and before possession of it has been regained by the carrier, is a grave and important question of commercial law of the utmost interest to all persons engaged in commerce and navigation. So, too, is the question whether, if the sale of

the cargo is, in such circumstances, ordered by the court on motion of the owner of cargo, made on the ground that the value of such cargo is being rapidly diminished by reason of the charges of custody and other costs and expenses, the owner of cargo is to answer for the breaking up of the voyage consequent upon such sale, and to be personally liable for the net freight which would have been earned had the voyage been completed. The right of the owner of cargo after such abandonment at sea of ship and cargo, at any time before the carrier or his agents have regained possession of the cargo, to treat the contract of affreightment as abandoned and at an end, is the settled law of England as established by the decisions cited below on p. 15 of this brief, unquestioned and uncontradicted by the decision of any court in that country. If the Eliza Lines had been taken by the salvors to a port in Nova Scotia or in New Brunswick instead of into Boston, and the same proceedings had there followed as followed in Boston, the master would have had no right to receive the cargo from the court against the objection of Ward & Company, and if sold by the court upon the motion of Ward & Company, even if made solely in their own interest, all the claims for salvage and general average would have been limited to the proceeds of sale in the registry of the court; the carrier would have been entitled to no freight and of course there would have been no claim by the bottomry bondholder, for the only justification of the decree against Ward & Company in favor of the bottomry bondholder is the consolidation of the causes. Ward & Company are not made parties to the bondholder's libel, and can in no way be liable on the bond. By all the express decisions in this country until the decision of the Circuit Court in this case, cited below on p. 15, 16 of this brief, the same right is recognized of the

owner of cargo to treat the contract of affreightment as abandoned and at an end after the abandonment by the carrier of ship and cargo upon the high seas, at any time before the carrier has regained possession.

The learned judge of the Court of Appeals, in his judgment, relies upon certain comments made by text writers upon the English decisions, and particularly the text writer Mr. Wendt in his work on Maritime Legislation. When a text writer like Mr. Wendt undertakes thus to criticise the considered judgments of Lord Esher, Lords Justices Cotton, Lindley, Kay and Smith, Sir Robert Phillimore, Sir James Hannen, Mr. Justice Butt and Mr. Justice Bruce, one is reminded of the remark made by Mr. Justice Gray delivering judgment in *Kimball* v. *Aetna Ins. Co.* 9 Allen, 540, where he says at p. 551, "This subject illustrates the wisdom of the common law in taking for its guides judicial opinions, given after argument, under the responsibility of determining the rights of parties in actual controversies, rather than the theories of scholars and commentators, however learned or acute."

Mr. Carver, in his third edition of Carriage by Sea, refers of course to the decision of the Circuit Court in this case just as he refers to the other decisions on the subject. It is somewhat interesting to note that Mr. Carver, whatever may be his academic views of the question, was himself counsel for the cargo owner in *The Arno*, 8 Asp. Mar. Cas. 5, the latest English decision on the subject, and the one which carries the rule farther than it had been carried in any previous decision, holding that the ship owner was entitled to no freight, although the ship had been carried by the salvors to the port of destination, and although the ship owner, as soon as he heard that his abandoned ship had been fallen in with by salvors, obtained from the

owners of the salving vessel an agreement, on security being given for the salvage claim, to hold the Arno on her arrival at any port in the United Kingdom for her owner; and although the ship owner had succeeded in putting a master appointed by him on board the Arno in the Channel before her arrival in port; and although the ship was formally made over to his agent by the salvors upon her arrival in port.

2. THE FACTS OF THE CASE.

The facts are practically not in dispute, and the evidence of them is found mostly in the testimony of Andreasen and of Hughes one of the salvors.

The charter party is found on pp. 35, 36 of the Record.

Evidence of loading of cargo, sailing on the voyage, the storm, leak, loss of bulwarks, cutting away masts and abandonment at sea without expectation of returning.

Andreasen, Rec. pp. 25, 26, 30, ints. 8, 9, 10, 11, 17, 19, 20, 22, 24, 25, 28, 30, 32, 37, 38, 39, 41, 44; + int. 85.

The signals of distress to a passing vessel and the master's request to be taken off with his crew.

Andreasen, Rec. p. 26, int. 31.

The finding and salving of the bark and cargo.

Hughes, Rec. pp, 54, 55, 56, 57, ints. 20, 22, 24, 27, 29, 30, 31, 34, 41, 50, 52, 54, 57, 62.

Information to Andreasen from his owners that bark had been towed into Boston and directions to proceed thither.

Andreasen, Rec. pp. 27, 28, ints. 49–51.

When Andreasen left St. John for Boston and when

he arrived in Boston he had no intention of resuming or offering to resume performance of tho contract of affreightment.

Andreasen, Rec. p. 29, int. 68.

Andreasen came to Boston with his steward and mates, but did not bring his crew which had not yet left St. John, although they had shipped for Liverpool.

Andreasen, Rec. pp. 28, 30, int. 51, + ints. 86, 87, 88.

Bark and cargo remained in the possession of the salvors until taken possession of by the marshal on the warrant from the court issued upon the filing of the libel.

Andreasen, indeed, asserts in various answers, claims, petitions, motions and libels filed by him, that he had resumed possession of the cargo before the warrant was served.

Rec. *Claim* p. 9, *Motion* p. 12b, *Answer* p. 123, *Libel* p. 135.

These assertions are, however, contradicted by his own sworn evidence and that of all the witnesses.

Andreasen, Rec. pp. 28, 30, 31, ints. 57, 58, 60, +ints. 91, 92, 93, 95, 96, 97, 98, 99, 102: also p. 77.

Hughes, Rec. p. 59, + ints. 81–88.

Lootz, Rec. pp. 93, 94, + ints. 32–35, 36, 37, 38, 39, 40, 45–50

The counsel for the salvors claimed in argument in the courts below that the master had regained possession before the service of the warrant, basing the argument upon a statement contained in the return of

the marshal on the warrant, that Andreasen was on board and in charge at the time of service of said vessel and cargo.

But the marshal had no jurisdiction to determine who was legally in possession of the cargo and does not assume to determine it. If he did, it would not be evidence against Ward & Company.

1 Greenl. Ev. § 498.
Arnold v. *Tourtellot*, 13 Pick. 172.
Lewis v. *Blair*, 1 N. H. 70.
Shannon v. *McMullin*, 25 Grattan, 211.
Johnson v. *Murphy*, 42 Verm. 645.
Worthy v. *Warner*, 119 Mass. 550.
Root v. *R. R. Co.* 45 Ohio St. 222, 232.
Lindley v. *Kelley*, 42 Ind. 294.
Charles City Plow & Manuf. Co. v. *Jones*, 71 Iowa, 234
The Lindrup, 70 Fed. Rep. 718.

The question is, however, put beyond controversy by the express finding of the Circuit Court that vessel and cargo remained in the actual possession of the salvors until they filed their libel for salvage against the bark, her cargo and freight September 26, 1889.

Rec. p. 175.

The finding of facts of the Circuit Court was adopted by the Court of Appeals.

Rec. p. 406.

Moreover, the entire opinion and discussion of the subject in both the Circuit Court and the Circuit Court of Appeals is wholly inconsistent with any assertion, that the carrier or his agent had regained possession of the cargo before the service of the warrant of the District Court.

The salvors filed their libel because both master and charterer were making adverse demands for possession of the cargo, each forbidding delivery of it to the other.

Rec. p. 109.

Master and charterer each filed a claim for the cargo at once and on the same day, though the master succeeded in getting his filed first by some minutes less than an hour, because he had the advantage of having for his proctor the same gentleman, who filed the libel for salvage for the salvors, and who thus had the first knowledge of its filing to file his claim for him.

Rec. pp. 109, 110.

3. EFFECT ON THE CONTRACT OF AFFREIGHTMENT OF ABANDONMENT AT SEA.

When the vessel has been abandoned at sea by the master and crew, as was the Eliza Lines in this case, without any intention of returning to her, the owner of cargo has the right, before the carrier or his agents have regained possession of the cargo, to treat the contract of affreightment as abandoned and at an end, and to receive his cargo without becoming liable for any freight; and this although the abandoned ship and cargo are carried by salvors to the original port of destination.

The Arno, 8 Asp. Mar. Cas. 5.

The Cito, L. R. 7 P. D. 5.

The Kathleen, L. R. 4 Ad. & Ecc. 269.

The Leptir, 5 Asp. Mar. Cas. 411.
S. C. 52 L. T. (N. S.) 768.

The Argonaut, Shipping Gazette, Weekly Summary, Dec. 5, 1884, p. 775.

The Elizabeth and Jane, 1 Ware, 41. (1823)
S. C. 15 Fed. Cas. 478. Case No. 8321.

The Mansanito, 22 Fed. Cas. 594. Case No. 13075. (1861)

The James Martin, 88 Fed. Rep. 649.
Dunnett v. *Tomhagen*, 3 Johns. 154. (1808)
Post v. *Robertson*, 1 Johns. 24. (1806)

The report of the Argonaut is not readily accessible and a printed copy of it is annexed as an appendix to this brief.

In *Dunnett* v. *Tomhagen* part of the cargo and in *The Arno* the whole cargo was brought by the salvors to the port of original destination, but it was nevertheless held that the shipowner was entitled to no freight.

In the English cases the derelict had been brought into port by salvors and libelled for salvage.

In *The Kathleen* the owners of cargo applied for an order of sale. The owners of the ship offered to give bail for the cargo, and insisted on a right to carry it to its original destination. Sir Robert Phillimore ordered the cargo sold and held that the carrier was entitled to no freight.

In *The Cito* the shipowner offered bail for the cargo, claiming the right to complete the carriage, but Sir Robert Phillimore ordered it delivered to the cargo owner upon stipulation for salvage, without the payment of any freight, and this order was affirmed on appeal by Lords Justices Brett, Cotton and Lindley. Lord Justice Cotton says in his judgment, "It is true that the shipowners could not by their own act put an end to the contract of affreightment, but by their abandonment they gave a right to the cargo owners to elect to treat the contract as at an end, and the shipowners could not, in my opinion, after their abandonment have objected, if the cargo owners had found another vessel and taken the cargo on in it to the port of destination."

In *The Argonaut* the cargo was carried by the salvor

into Plymouth, its original destination having been Liverpool. While it was still at Plymouth, the cargo owner applied for its delivery to him upon stipulation. Sir James Hannen, however, ordered the cargo removed on board the Argonaut from Plymouth to Liverpool, where it appeared that a higher price could be obtained for it than at Plymouth, and then ordered the cargo owner to pay to the owners of the ship the expenses of the carriage from Plymouth to Liverpool, while denying to the shipowner any other freight. This order was reversed by the court of appeal, the Master of the Rolls and Lord Justice Lindley holding that the cargo owner was entitled to the delivery which he had asked for at Plymouth, without the payment of any freight, and was not liable for the expense of the carriage from Plymouth to Liverpool. Brett, Master of the Rolls, afterwards Lord Esher, says in his judgment in this case that the decisions in *The Kathleen* and *The Cito* are founded upon perfect principles of law.

In *The Arno* the ship and cargo were brought by the salvor to the port of original destination. Mr. Justice Bruce in his judgment puts the matter thus: "The real question is whether, as far as the owner of the ship is concerned, there was on his part, or on the part of his servants, an act done so clearly indicating his intention not to carry out the contract as to entitle the owners of the cargo to treat that act as putting an end to the contract." And he held that the abandonment of the ship and cargo at sea under stress of an excepted peril, without an intention to return, was such an act, and ordered the delivery of the cargo to the cargo owner without the payment of any freight, which was affirmed on appeal by Lord Esher and Lords Justices Kay and Smith.

In *The Leptir* Mr. Justice Butt found that there had

been no abandonment of the ship and cargo by the master and crew, that if there had been abandonment it would not have been justified by the circumstances, but would have been a breach of the contract of affreightment, and therefore the principle of *The Cito* did not apply.

Dunnett v. *Tomhagen* was an action by seamen for wages. The ship and part of the cargo had been abandoned at sea from necessity by the master and crew who left in a boat, and part of the cargo was taken in the boat. They were picked up by a vessel called the Morning Star and brought with the cargo which had been saved to New York, the port of original destination, and there the merchandise, which had been saved was libelled for salvage by the crew of the Morning Star. Wages were claimed on the ground that freight had been earned on this part of the cargo, and they were allowed upon this ground in the court below, but the decision was reversed by the Supreme Court of Errors composed of Chief Justice Kent and Judges Thompson, Spencer, Van Ness and Yates. Chief Justice Kent delivering the opinion of the court said: "No freight was earned because no part of the cargo was delivered by the ship. A salvor and not the ship owner was here the deliverer of the goods saved."

Post v. *Robertson* was an action to recover freight claimed to be due under a charter party. The ship and cargo had been abandoned at sea by the master and crew, and brought by salvors into the port of New York, which was the port of original destination under the charter party, and there libelled for salvage. The cargo was sold by order of court, half the proceeds paid to the salvors, the other half to the owner of the cargo. Chancellor Kent, with Judges Thompson, Spencer and Daniel D. Tompkins, held that no freight

was due under the contract, but suggesting without deciding, that a promise by the owner of the goods to pay a *pro rata* freight might be implied from his acceptance of the goods from the salvors, entered a nonsuit, leaving the question open. Mr. Justice Brockholst Livingston dissented from this suggestion, holding in a strong opinion that no freight was due either contract or *pro rata*, and that judgment should be entered for the defendant. Mr. Justice Livingston in this judgment, commenting on Lord Mansfield's judgment in *Luke* v. *Lyde*, and criticising it, says, "If *Lyde* had taken his goods out of the hands of the master, there might be some reason for adding to his other misfortunes that of the payment of freight; but receiving them of the salvors, in preference to a total dereliction, could never form the basis of a claim on the part of one who had *entirely* failed in his contract, which was to *carry* them to *Lisbon*. It was a demand sanctioned neither by the contract nor any one principle of justice." He also says in his judgment: "The charter party was dissolved from the moment the vessel was abandoned."

Judge Ware considers that the suggestion of the majority of the court in *Post* v. *Robertson*, that some freight might be due under an implied promise, was overruled by the later decision of the same court in *Dunnett* v. *Tomhagen*.

The Elizabeth and Jane was also a proceeding for mariners' wages. There, too, the brig and cargo had been left derelict at sea by the master and crew, and brought in by salvors. There, too, wages were claimed on the ground that freight had been earned on the cargo which had been saved, but Judge Ware refused to allow them, saying, with respect to the contention that freight had been earned, "In answer to this argument, it may be said that the principles before stated

apply with as much force to the question of freight as wages. The merchant receives his goods but with the deduction of salvage, and they are delivered not by the shipowner, but by the salvor. The possession of the salvor deprives the carrier of the capacity of performing this essential part of the contract. On the whole it seems a fair deduction from these *premises that* by shipwreck, with abandonment by the crew, the contract is totally dissolved. Such seems to me to be the legitimate inference from the acknowledged principles of the marine law; and so the law is stated by the learned editor of Abb. Shipp. p. 512."

One of the principles referred to in the above as before stated, had been stated by the learned judge as follows: "But it is from the salvor only that the owner can receive his goods, and to the owner only is the salvor accountable. The master and the mariners having lost the possession cannot resume it. These are familiar and well-established principles of the marine law."

In the case of *The Mansanito* the derelict had been brought in by salvors and libelled for salvage. The owners of the vessel gave notice to the owners of cargo that they held themselves in readiness to forward the cargo to its destination. The cargo which was iron having been afterwards sold under the order of the court, the owners of the vessel applied for payment to them of freight out of the proceeds, and it was refused by Judge Shipman.

In the case of *The James Martin* the vessel and cargo had been abandoned on the high seas, when the greater part of the voyage had been performed, and had been brought by salvors to the port of destination. Judge Hughes found that the abandonment was unwarranted, and not only refused all freight to the shipowner, but

condemned him to pay for the amounts paid for salvage and as damages to the cargo.

When Captain Andreasen thus abandoned the bark and cargo on the high seas, he abandoned for himself and his owners so far as he could the contract of affreightment. He abandoned possession and he and his owners were without power to further perform the contract.

It is the abandonment of his possession by the master, when he abandons his ship and cargo at sea without intention of returning, thus putting it out of his power to complete the performance of the contract of affreightment, which deprives him of the right to insist upon carrying it out, at least until he is restored to possession so that he is at full liberty to proceed with his contract.

The owner of cargo, when the master has thus parted with the possession, is under no obligation, either by his contract or by the relation of the parties, to restore the possession to the master or to abstain from interfering to prevent the possession from being restored to him. When the owner of cargo receives possession of it from the salvor, after the abandonment by the master, or from the court upon stipulating for salvage, or by the sale of it under order of court and the payment of proceeds into the registry, if that may be said to give the owner of cargo possession, such possession is not obtained or taken from the master, but is obtained from the salvor or from the court, and there is no delivery by the carrier. It imposes no obligation on the cargo owner to restore it to the master and the obligations and liabilities of the owner of cargo to the carrier, when he receives possession of it at an intermediate port from the master, afford no measure of

and throw no light upon the cargo owner's rights, obligations or liabilities when he receives that possession, not from the master or from the carrier, but from the salvor or from the court.

According to the decision of the Circuit Court of Appeals, if Ward & Company had been informed of the abandonment at sea by the master of the Eliza Lines and her cargo, and had thereupon sent out a tug which had found and brought bark and cargo into port, the owners of the Eliza Lines would have still had the right, within a reasonable time, to insist upon carrying the cargo to its original destination and earning the freight.

There can be no question, that when the master and crew left the bark and cargo floating derelict on the ocean with no intention of returning, it was an abandonment by the shipowner through his agent of the contract of carriage, and a renunciation of that undertaking. This does not depend in the least upon any question of the intervention of an excepted peril. Peril or no peril, the abandonment of possession with no intention of resuming it must inevitably be a renunciation of the undertaking to carry. The intervention or non-existence of an excepted peril determines only whether the abandonment was justified by the contract or was a breach of it.

It is the general rule laid down by the highest authority that after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any further performance of it, retaining his right to sue for any damages he has suffered from any breach of it.

Roehm v. *Horst*, 178 U. S. 1.

If the abandonment by her master and crew of the

bark Eliza Lines and cargo had not been justified by a peril excepted in the contract of affreightment, the cargo owner had an immediate right of action against the carrier, and this right of action could not have been defeated by any subsequent offer or attempt of the carrier, if the cargo afterwards happened to come within his reach, to resume performance of his contract and complete the carriage.

Roehm v. *Horst*, 178 U. S. 1.

In determining what were the rights of the owners of the cargo of the Eliza Lines upon this abandonment of their property and renunciation of the contract by the agent of the shipowner, it is necessary to determine what those rights were only while the carrier remained out of possession of the property, which his agents had thus abandoned, because when the sale of the cargo was ordered by the District Court, possession of it had never again been obtained by the carrier after the abandonment of it by his agent.

If before any assertion by Ward & Company of their right to treat the contract of affreightment as at an end, the carrier or his agents had succeeded in regaining possession of the cargo and thus regaining power to carry out the contract of affreightment, the question would have been a different one, and it is not necessary to determine that, in the case thus supposed, Ward & Company would still have been entitled to treat the contract as at an end. Ward & Company from the beginning made clear their intention to treat the contract of affreightment as abandoned in accordance with their right.

If the contract was at an end by the abandonment at sea, or if Ward & Company had the right so to treat it, then that contract could not be revived or

renewed against the objection of Ward & Company, and possession taken by the master against the wish or without the consent of Ward & Company would be of no effect.

No decision as to the obligation of the cargo owner to pay full freight, if he takes his cargo from the carrier at an intermediate port in case of disaster or for any other reason, when the carrier has at no time parted with the possession of it, and no decision as to the rights of the parties in cases of shipwreck or other disaster, where the carrier has always retained the possession and thus the power to continue performance of his contract of carriage, has any application in this case because this controlling feature of continued possession is lacking from it.

The question of obligation to repair and furnish money to complete the voyage, so long as the carrier and his agents have not abandoned the possession and the undertaking, is a question of what will justify the carrier in abandoniug the contract of carriage or of what will release him from the obligation to complete it. The principles involved in that question can, of course, have no application when the carrier has already abandoned the possession and the contract of carriage upon the happening of an excepted peril.

Nor are the decisions of prize courts in cases of capture applicable. In cases of capture the possession of ship and cargo is forcibly taken from the master and crew and not abandoned by them. The reasons are given in the judgment, p. 198, of the learned Justice of the Circuit Court when he says "because capture is not under ordinary circumstances the equivalent of derelict. In capture there is no such abandonment as that which, according to the authorities cited by James

E. Ward & Company form the basis of a dissolution of the contract of affreightment. If the vessel and cargo are restored after being captured, it is by virtue of the *jus postliminii*, which it may be said is not analogous to the rights of the owners in a derelict brought in by salvors." And Mr. Justice Story says in *The Nathaniel Hooper*, 3 Sumn. 542, "But it is not safe or correct in many cases to reason from the peculiar doctrines arising out of the administration of international law and policy in courts of prize to the ordinary exigencies of commerce, or the ordinary interpretation of common civil contracts. Courts of prize exercise a very peculiar and extensive jurisdiction *sui generis* upon very enlarged views, and a sort of international discretion, which do not belong to the common functions of other courts, or even of courts of admiralty in the exercise of their jurisdiction as instance courts."

4. THE CARRIER NOT BOUND TO RESUME THE VOYAGE.

If the act of strangers in saving vessel and cargo can operate as a revocation of the abandonment at sea, that revocation should be for the benefit of both parties alike, and not for the benefit of only one of them; yet while, by the decision of the Court of Appeals, the ship owner without regaining possession still has the right to resume the voyage against the will of the cargo owner, the cargo owner cannot compel the shipowner to resume against his will. When the derelict has been saved and placed by the salvor in the custody of the court, the carrier, if the abandonment of possession has been under stress of an excepted peril, has committed no breach of his contract, is under no obligation to resume performance of it, and the owner of the goods has no remedy.

The carrier is not bound to stipulate for the cargo or even for his own ship. He can without any breach of

contract leave the salvage proceedings to take their course and let his ship be sold to pay the salvage. It is so expressly decided in *The Nathaniel Hooper*, 3 Sumn. 542, and no trace of any contrary doctrine can be discovered in any text book or in any adjudged case.

The owner of cargo may stipulate for his cargo but he has no right to stipulate for the ship. If he find her derelict upon the high seas with his cargo on board, he has no right to take possession of her except as a salvor: certainly not for the purpose of completing the carriage of his cargo.

The Arno, 8 Asp. Mar. Cas. 5.

The freedom of the carrier from obligation to resume is because he has justifiably renounced performance by the abandonment under stress of the excepted peril. No other thing has intervened to release him from his obligation on the contract of affreightment. It necessarily follows, therefore, that the cargo owner has the right to accept and act upon the renunciation, at least until the carrier has regained possession and so placed himself in position to resume performance. When the carrier has regained possession he is bound for the further performance of his contract, unless some new event constituting an exception shall release him. The peril which excuses the owners of the Eliza Lines is a mutually excepted peril and ought to excuse Ward & Company so long as it excuses the owners of the bark, which thus appears to be until they regain possession.

5. THE VOYAGE OF THE ELIZA LINES COULD NOT AFTER THE ABANDONMENT BY THE MASTER AND CREW BE RESUMED, AS CONCERNS THE CARGO OWNER, WITH THE SAME CHARACTER OF A TRANSACTION OF COMMERCE.

When Ward & Company shipped their cargo from Pensacola for Montevideo, the adventure and the voy-

age of the bark were an ordinary transaction of commerce. When the masts had been cut away and the bark damaged by the storm, with part of the deck cargo jettisoned, had been abandoned by the master and saved and brought into Boston and libelled by the salvors, these circumstances necessarily worked an entire change. The damage to the cargo with the charges for salvage and general average would of course exceed, and did in fact far exceed, fifty per cent of its value, and worked a constructive total loss of cargo. Ward & Company abandoned to their underwriters, the Atlantic Mutual Insurance Company, the underwriters accepted the abandonment, paid a total loss adjusted at $4560, and took an assignment of the cargo.

Rec. pp. 41–47.
Dunham, pp. 47, 48, Ints. 1, 2.
Chapman, pp. 50, 51, Ints. 1, 2.

There is no commercial enterprise in the carriage to Montevideo of a cargo thus abandoned to underwriters. The Insurance Company is not in the business of sending lumber to Montevideo for sale. Their only interest is, after satisfying the liens, to realize as much as they can and as soon as they can from what has been abandoned to them. What justice is there in compelling the underwriter to pay for the transportation to Montevideo of a cargo encumbered by liens far exceeding half its value, that is, to pay for its carriage for the benefit of others and not for his own benefit? The amount awarded for general average $2225.24, Rec. p. 248), alone exceeds the gross proceeds of the sale of the cargo, which amounted to $1825, Rec. p. 14. If it be claimed that the insurer must bear this because

he succeeded to the obligation of the insured, what justice is there in compelling Ward & Company to pay for the carriage to Montevideo, for the benefit of others, of a cargo thus emptied of its value? And this destruction of the character of the enterprise was by the peril of the sea, which disabled the bark and obliged the master to abandon her, and is mutually excepted in the contract of affreightment. The proceedings are in the name of Ward & Company, but the underwriter will have to bear the burden of any personal decree against Ward & Company, beside paying for a total loss.

Rec. p. 15.

6. WARD & COMPANY NOT LIABLE TO ANY DECREE AGAINST THEM PERSONALLY.

. Ward & Company having the right and exercising it to treat the contract of affreightment as at an end, it necessarily follows that they are not liable personally and that no decree can properly be made against them personally. They are not liable upon any express contract and can be liable only upon an implied contract, to pay for benefits received by services rendered to or sacrifices made to save their cargo.

Ward & Company might have taken their cargo subject to the claims for salvage and general average, but they were not bound to do so, and had a perfect right to have the cargo sold by the court and the proceeds of sale applied to the satisfaction of these claims. The cargo having been sold and the whole proceeds of the sale being in the custody of the court, the claims for salvage and general average must be limited to those proceeds. Those proceeds represent the full value of

the goods in Boston, and include all possible benefit conferred upon the owner of them by the salvors or by the average sacrifice. The basis of the salvage claim as well as of the claim for average contribution is, that property has been saved for the owner's benefit. No owner, none of whose property comes to his hands, is liable personally for salvage or for general average, and when all the property saved has been exhausted in the satisfaction of the claims for salvage and general average, there can be no further liability of the owner of it.

Flaherty v. *Doane*, 1 Lowell, 148, 150.

The salvor is paid because he saves something for the owner. General average is paid because something has been saved for the owner by the sacrifice for the common benefit. When nothing is saved for the owner he is not benefited, and is under no liability. By the decree of the District Court, from which Ward & Company claimed no appeal, their whole property is taken from them and they get nothing. They therefore received no benefit from the salvors or from the average sacrifice, and are under no further liability.

The District Court made a decree in favor of the carrier for *pro rata* freight. This was error, but as it was confined for its satisfaction to the proceeds in the registry of the sale of the cargo, Ward & Company did not appeal from it. Any claim for *pro rata* freight is necessarily confined to the proceeds of sale in the registry for the same reasons that claims for salvage and general average are so confined. *Pro rata* freight, when the carrier has not performed his entire contract of affreightment, rests upon the theory that the owner

of the cargo has been benefited by part carriage, and should therefore pay for it. As none of the cargo in this case came to the possession of Ward & Company, and as the whole proceeds of the sale of it were by the decrees of the District Court awarded to others, it is quite clear that Ward & Company received no benefit from the part carriage, and the court was quite right in confining the decree for *pro rata* freight to the proceeds in the registry for its satisfaction, and in refusing to make a decree against Ward & Company personally. The proceeds in the registry represented the full value of the goods in Boston and included all possible benefit conferred upon the owner of them by the carriage of them from Pensacola to Boston.

The bottomry bondholder, of course, had no personal claim against Ward & Company, and the decree against Ward & Company for bottomry must rest wholly upon the consolidation of the causes, and convenience in the distribution of the amount awarded against them.

7. LEGAL EFFECT OF THE SALE OF CARGO BY THE COURT.

Whatever may have been the rights of the parties to the contract of affreightment, the vessel after arrival at Boston came into the custody of the court upon a libel for salvage, in which the salvors prayed that the vessel and cargo might be sold, and salvage awarded from the proceeds.

Record, p. 7*d*.

Ward & Company also came in and moved that the cargo be sold, and this motion and order of the court thereon appear from the record to have been made, *not* on the ground that Ward & Company were entitled to possession, and therefore could demand the sale of

the property by the court for their benefit, but because on hearing all the parties, the court in its discretion concluded, that it was for the interest of all concerned, that the cargo should be sold and not delivered to either the cargo owner or to the shipowner upon stipulation.

The reasons given in the motion are *not*, that the cargo owner had the right of control and asked for a sale on that ground, but that the value of the cargo was being rapidly diminished, a thing contrary to the interest of salvors, and also of the shipowners in view of their claim for general average contribution.

Record, p. 13.

p. 136, Art. Tenth.

The motion was made in the suit for salvage, and there was a formal hearing upon it October 18th, 1889, at which evidence was adduced, and at which counsel for all the parties were present, and were heard upon the question, whether the cargo should be delivered to the cargo owner or to the shipowner or should be sold.

See Record, pp. 76, 77, 78.

It would seem that the learned Justice of the Circuit Court must have overlooked these facts, when he says in his opinion

(*a.*) That the salvors did not apply for a sale.

Record, p. 177.

While it does not appear that they filed a motion for a sale, they asked for a sale in their libel, and could not object to one, or appeal from an order, which is in pursuance of their express prayer.

(*b.*) That the sale of the cargo was not a sale for necessity under the Rules.

Record, p. 177.

If it was for the benefit of all concerned it was a sale for necessity, within the meaning of the Admiralty Rules.

(*c.*) That it was made only in the interest of the cargo owner.

Record, p. 178, at middle.

(*d.*) That it was made on a summary order and without plea or proof or judicial decree on an issue solemnly made.

p. 179 at middle.

For the District Court had before it at the time of the hearing, and considered, the libel for salvage, the shipowner's motion to bond, the cargo owner's motion to bond, and the cargo owner's libel for possession, and heard evidence in the matter.

See Certificate of District Judge, p. 78.

If the District Court had been deciding the question upon the right to possession, it would have delivered the cargo to the cargo owner, and would not have orderd a sale; nor would the court have later ordered Ward & Company's libel for possession dismissed as of November 19, 1889, the date of the order of sale.

With all due respect to the learned Justice of the Circuit Court, one of the best established and beneficent powers of the Admiralty Court has always been that of ordering a sale upon the happening of a maritime disaster, after hearing all persons concerned. This power has been exercised for the very purpose of settling the question of the necessity, and taking the responsibility from the shoulders of any one interested in the adventure; and while it is oftenest invoked by the master in order to relieve himself from responsibility, as for

instance in selling cargo to obtain funds to carry on the voyage, it may be invoked by a cargo owner or by any one else who is interested.

2. Parsons on Shipping & Admiralty, pp. 338 *et seq.*
Benedict's Admiralty Practice, 3d Ed. Sect. 299.
The Fanny & Elmira, Edward's Adm. Rep. 117.
The Gettysburg, 5 Asp. Mar. Cas. 347.
Janney v. *Columbian Ins. Co.* 10 Wheaton, 411, 418.
Dorr v. *Pacific Ins. Co.* 7 Wheaton, 581.
Dunlap's Adm. Prac. p. 64.

When the master sells upon a marine disaster, even without any legal proceedings, if it be done *bona fide* for the benefit of all concerned, the sale is upheld as against all persons, even though as a matter of fact it turns out to have been unfortunate.

The Amelie, 6 Wallace, 18.
Post v. *Jones*, 19 How. 150.

Yet in this case, when a sale has been made in a port of refuge by order of an admiralty court upon due proceedings, and after hearing all persons interested, the Circuit Court rules that it must be assumed to have been made, unless the cargo is perishable, in the interest of the party moving it, and that that party is liable for the consequences of it.

Record, p. 178.

It is hard to understand the citation of the case of the Schooner Tilton in support of the proposition, to which it is cited by the Circuit Court at the bottom of page 178. It was a libel *in rem* for possession by owners of a vessel, which had been stranded and sold

by a wreck commissioner, acting in collusion with the master and without necessity, and where the purchasers were affected with notice of the circumstances. The court held that the sale was invalid. It was not, as would appear from what is said about it by the Circuit Court, an action on a bill of lading, and no question of liability on a bill of lading arose in the case. The vessel was in ballast and had no cargo aboard, so none was sold. It was not a judicial sale by order of an Admiralty Court and no question of failure of the owners to have funds or of fault of the owners in any way was involved in the case. It seems to have no bearing upon the proposition to which it is cited, namely, that "on a sale of any part of a cargo in a foreign port by authority of the admiralty, if it transpires that the owner ought to have had funds in that port, or was otherwise at fault, then notwithstanding the sale was by an order of the court, the master by applying for and securing it, subjects his vessel to a liability on the bill of lading."

The assumption of the Circuit Court, that the District Court, sitting in admiralty and having all the parties in interest before it and contesting, made an order wholly in the interest of one of the parties is, to say the least, somewhat unwarranted.

It is quite within the bounds of possibility that a case might arise, where two contending parties claimed the right of possession of a vessel, and that neither was able to bond her, and it might be made apparent to the court, that owing to difficulty of getting evidence or other cause of delay, the value of the vessel would be entirely exhausted by the expenses of custody before a decree could be entered, and that she could be sold to great advantage at the time of the application for a sale. If, under such circumstances, the court ordered

a sale it certaintly could not be contended for a moment, that the party making the application was liable to the other for the consequences.

It is not apparent how such a case would differ in principle from the case at bar.

The grounds for the motion for a sale were well known and valid grounds and grounds on which the courts have frequenty ordered sales. There is no absolute right in case of salvage to a delivery of the property on stipulation.

300 tons of Iron Ore, 38 Fed. Rep. 36, 42, 43.
The Nathaniel Hooper, 3 Sumn. 542, 562, 563.
The Mendota, 14, Fed. Rep. 358.
The Kathleen, L. R. 4. Add. & Ecc. 269, 272.
The Lion, 1 Sprague, 399, 401.

If the District Court after the hearing on the question of right to possession had ordered the cargo delivered to the cargo owner on stipulation, which covered only the value of the cargo at Boston, the consequences to the shipowner would have been the same, and yet it would hardly be contended, that the Circuit Court, on appeal, could award damages to the shipowner for such action of the District Court.

There can be no difference in principle between a sale and a delivery on bail.

If the cargo had been detained in custody pending the suit since 1889, the allegation in the motion for a sale would have been amply justified.

The opinion of the Circuit Court seems to imply, that the action of the District Court in ordering a sale was an extra judicial act, taken *in pais* by the court acting as the agent of the cargo owner, for if it was a judicial act the cargo owner certainly cannot be responsible for its consequences.

In proceedings *in rem* the allowance of process is the act of the law, so that no damages are allowed for the arrest and detention of a vessel, unless there is bad faith or deceit practiced in suing out the warrant, or the suit is one that may be characterized as a malicious prosecution.

The Alex Gibson, 44 Fed. Rep. 371, 374.
The Adolph, 5 Fed. Rep. 114.
Kemp v. *Brown*, 43 Fed. Rep. 391.
The Wasco, 53 Fed. Rep. 546.
Henry Adm. p. 337.

Where a sale *pendente lite* is fairly made upon a valid order of the court, to prevent the property being eaten up by charges, it protects all parties equally with the purchaser.

300 Tons of Iron Ore, 38 Fed. Rep. 36, 42, 43.
American Ins. Co. v. *Johnson*, 1 Blatchf. & H. 9.

The sale is the act of the court in a somewhat higher sense than an arrest under process, because made on special order.

300 Tons of Iron Ore, 38 Fed. Rep. 36, 42.

And is presumably for the benefit of all concerned.

300 Tons of Iron Ore, 38 Fed. Rep. 36, 43.
Pollard v. *Baker*, 101 Mass. 259.

The mere dismissal of the original suit or a reversal on appeal, on grounds not affecting the jurisdiction, do not affect the validity of sales *pendente lite*.

300 Tons of Iron Ore, 38 Fed. Rep. 36, 42.

In a strictly judicial sale the court itself is properly

the vendor, and the sale, in so far as the owner of the property is concerned, is an involuntary one.

Kleber on Judicial Sales, sect. 2. pp. 58 & 59, and cases cited.

Sales in admiralty are strictly judicial.

Kleber, sect. 9. p. 62.

The following words, near the bottom of page 73 of the record "in pursuance of which the decree entered Nov. 16, 1889, ordering a sale of the cargo was entered," in the sentence following the certificate of the clerk, and preceding the copy of Judge Nelson's opinion, are an impertinent interpolation. They do not purport to be any part of the opinion, or of the record, are not certified by the clerk, and should be struck out. There is nothing properly in the record to show that the motion for an order of sale was allowed upon any grounds other than those stated in it, and in the prayer in the salvor's libel (p. 7*d*) that the court should order said cargo to be sold.

And as seen above, the sale has been amply justified on that ground, by the length of time, which has elapsed, before a final decision has been reached in the case.

Then, too, even if the contract of affreightment were still in force, the master had no absolute right to have the cargo delivered to him upon stipulation. The language of Admiralty Rule 10 is that the court *may* order the *res* delivered upon a stipulation, and it is clearly left to the discretion of the court whether, in any case, such order shall be made, or whether the order shall be for a sale.

The Nathaniel Hooper, 3 *Sumn.* 542, 562, 563.

Why in this case, should this discretion have been exercised in favor of delivery of possession to the mas-

ter upon stipulation? If his purpose in seeking possession was to complete the carriage of the cargo to its destination, and so to subject it to the payment of the chartered freight, it would be grossly inequitable and unjust to those interested in the cargo to have permitted him to do so. The interest of the owner in the cargo had, by the dangers of the seas, been rendered practically of no value. The master had left it derelict and, had it never been found or saved, would have been free from liability to the owner for abandoning it under the exception in the charter party of dangers of the seas and navigation. As the result of these dangers of the seas and navigation, the cargo, in the possession of the court, had become subjected to liens, which, in any event, must practically exhaust the greater part of its value. There was first the lien of the salvors. According to all precedent, salvors of a cargo, derelict in the circumstances in which this one was, would be awarded fifty per cent of its value. They have been awarded forty-five. Half the cargo, therefore, had practically become the property of the salvors and had ceased to be the property of the owner. Then there was the lien for general average. To permit the owner, by the carriage of his property after it had so become encumbered and after his interest in it had so been divested or emptied of its value, to become liable to a claim for chartered freight would be the height of injustice. Why should he be compelled to pay for the carriage of property, which had become practically the property of other people? It has, in fact, all been absorbed in satisfying the liens and none of it has come to those representing the original owner.

Here is abundant reason for the refusal of the court in its discretion to put the cargo in possession of the master for completion of the voyage, and for ordering

a sale, but it is not all: in addition a part of the cargo had been jettisoned.

Andreasen, p. 27, ints. 43, 44.

It had all been damaged anywhere from ten per cent to forty per cent of its value, according to the witnesses.

Darrach, p. 318, int. 25.
Roberts, pp. 296, 297, + ints. 69–78.

And it would have suffered further damage if carried on.

Darrach, p. 328, ints. 107–109.
p. 329, + ints. 110–113.

It was plainly inequitable, when the cargo had been thus emptied of value to its owner by its having become practically the property of others, for the court to order it to be delivered to the shipowner to be carried on, and thus to subject the owner of it to the payment of full freight for the benefit of other people. To quote the language of Mr. Justice Livingston in *Post* v. *Robertson*, 1 Johns, 24, there was no reason for adding to the other misfortunes of the cargo owner the payment of freight.

From every point of view the sale appears to have been a just and proper one, and it is to be noted, that the cargo owners, when they took no appeal from the decree of the District Court, abandoned all claim to any of the proceeds. They consented to retire with the loss of their whole cargo.

The ruling of the Circuit Court that Ward & Company because they were not, according to that court's decision, entitled to treat the contract of affreightment

as at an end, must answer for the consequences of the breaking up of the voyage by the sale of the cargo under the order of the District Court, and must pay freight to Montevideo is erroneous on another and wholly distinct ground.

If the order of sale made by the District Court was not an order made in the exercise of its discretion for the best interests of all parties concerned, but was an order erroneously made in favor of the cargo owner upon an unfounded claim of right, to the injury both of the salvor and of the shipowner, the obvious remedy of the salvor and of the shipowner was by writ of prohibition, and not by appeal from the final decree. No appeal was claimed at the time from this order of sale. The District Court would, of course, have stayed the execution of the order of sale in order to afford an opportunity for an application for a writ of prohibition. The Supreme Court was in session, and application could have been made at once for a writ of prohibition. No such application was made or suggested, and no stay of proceedings for the purpose of making one was asked for. The obvious remedy, therefore, not having been sought, the owners of cargo cannot now upon appeal be held to answer for the breaking up of the voyage by the sale.

If the abandonment at sea gave the cargo owner the right to treat the contract of affreightment as at an end, or if the sale by the court established the necessity of abandonment of the adventure, then the voyage was rightfully broken up in Boston, and no freight is due to the shipowner. Ward & Company had good ground of appeal from the allowance by the District Court of *pro rata* freight, but they did not appeal.

8. THE JUDGMENT OF THE CIRCUIT COURT.

The learned Justice in the Circuit Court, Rec. p. 199, speaking of some of the decisions and text books, remarks that no late English authorities are found contravening the doctrine. He might have added that neither are any early English authorities found contravening it. He concedes that the decisions and text books make a great weight of authority, but held them to be subject to examination, because he regarded them as constituting only a modern declaration of how the rule ought to be laid down. Beginning, however, as they do, nearly a century ago, they are not all so wholly destitute of antiquity. Nor is the fact of great weight, if it be one, that no such principle is before the case of *The Kathleen* to be discovered in Maclachlan on Shipping, or in Abbott on Shipping. Judge Ware seems to have thought in 1823 that the rule was to be legitimately inferred from the acknowledged principles of the marine law, and that the law was then so stated in Abbott on Shipping to which he refers. The American cases, which before *The Kathleen* had stated it, may have been overlooked by the text writers, and no case may before that have arisen in England, the facts of which permitted the application of the principle. It is equally true that no statement of the contrary principle can be discovered in any adjudged case before or since the decision of *The Kathleen*, except the decision of the Circuit Court in the case at bar. The contrary principle, as established by that decision of the Circuit Court, appears to be this: that when a carrier by sea has abandoned performance of his contract of carriage by abandoning, under stress of an excepted peril, the possession of the goods entrusted to him for carriage, before bringing them to their destination, with no intention of returning or resuming it, and when the

owner of the goods, while they are still out of the possession of the carrier, has signified his acceptance of the carrier's act, and his determination to treat the contract of carriage as abandoned, the carrier has nevertheless the right to insist upon resuming performance of his contract, and to entitle himself thereby to his full freight, and the owner of the goods has no right to object to such resumption of performance unless upon condition of paying full freight. No trace of any such doctrine is anywhere to be found.

The learned Justice suggests that there is some doubt whether in *The Kathleen* the cargo was regarded as perishable. It was not a perishable cargo; it was cotton. An affidavit was made that it was deteriorating. This was analogous to the statement made in the motion as the ground for a sale of the cargo of *The Eliza Lines* in the District Court, Rec. p. 13, "that the value of said cargo is being rapidly diminished by reason of the charges of custody and other costs and expenses." Sir Robert Phillimore does not found his judgment in any way upon the fact that the cargo was perishable.

The learned Justice of the Circuit Court seems to find some difference in the principle as established by the decision in *The Kathleen* and by the decision in *The Cito*. Sir Robert Phillimore in *The Kathleen* is speaking of the case before him, in which the owner of cargo had appeared and signified his acceptance of the carrier's act and his intention to treat the contract of carriage as abandoned. In these circumstances the original contract was at an end as Sir Robert Phillimore says it was, and it was also true, as Sir Robert Phillimore says, that if the contract had not been thus ended the ship would have had a right to represent the cargo as well as the ship. He nowhere says, any more

than the Lords Justices of appeal say in *The Cito*, that the abandonment of the contract by the carrier without more, at once, and without the assent of the cargo owner so far as he is concerned, dissolves the contract, although that statement is made both by Judge Ware and by Mr. Justice Livingston. Sir Robert Phillimore says also that the master at the time of abandonment had certainly lost all rights to freight, or to carry on the cargo, which is entirely consistent with the judgment in *The Cito*.

The owner of cargo has, of course, the right to contest the sufficiency of the peril to excuse the carrier's abandonment. He cannot be deprived of this right by the act of the carrier alone When, however, he assents to the abandonment the contract is dissolved. If the abandonment is excused by an excepted peril, consent of the cargo owner to a revocation by the carrier of his renunciation, upon a subsequent change of circumstances, is implied when the owner of cargo does not signify his acceptance of the abandonment and renunciation and allows the carrier to resume possession.

The vessel is no more discharged from the cargo on the theory of Sir Robert Phillimore than she is on the theory of the Circuit Court. The ship is discharged from the cargo by the abandonment on the intervention of the excepted peril, and when the property has got into the possession of the court on a libel for salvage by salvors, the owner of the cargo is without power to compel the carrier, against his will, to resume the carriage. The only difference is that Sir Robert Phillimore and the other judges hold that the carrier has not the right to resume the carriage against the will of the cargo owner, while the Circuit Court holds that he has. This seems to be a greater injustice than any that is suggested by the Circuit Court as resulting

from the principle supported by the English cases, for the principle of the Circuit Court leaves the carrier at liberty to resume or not as he chooses, while the cargo owner is without any option, and can only conform to the carrier's choice. Both parties have contracted subject to an excepted peril. It would certainly seem that if that peril has occurred so as to excuse one of the parties to the contract, it must equally excuse the other. The derelict floats upon the ocean. The carrier has abandoned his undertaking and is excused by the excepted peril. No one ought to deny that if the cargo owner should happen by, he could take possession of his cargo and dispose of it as he might please, without incurring any obligation to the carrier. Upon what principle can the intervention of the salvor affect or vary the rights of either party except to subject the property to the payment of salvage? The cargo owner receives his property from the salvor, or from the court, exactly, so far as the carrier is concerned, as if he had fallen in with it and taken it floating on the ocean. He does not take it from the possession of the carrier, and incurs no obligation to him by paying or securing the salvage, and receiving the possession from the salvor or from the court. If he incurs no obligation by receiving his property from the salvor or from the court, he of course incurs none by procuring an order of court for the sale of it.

The position of the parties is then, by the decision of the Circuit Court, reduced to this: If the carrier does not choose to stipulate, but permits his ship to be sold in the salvage proceedings, or if he is unable to give security and obtain her release, the owner of cargo has no remedy if the abandonment of the carriage, the original abandonment, was under stress of an excepted peril. Resumption was prevented by the sale of the ship under order of the court, which the carrier is

under no obligation to avert. However much the owner of the goods may wish the carriage completed, if it is not for the interest of the carrier to resume performance, and performance is not resumed, there is thus no remedy. If, however, it is for the interest of the carrier that the carriage shall be resumed, he may offer to stipulate and resume performance, and the owner of the goods must pay full freight either for completion of the carriage or for refusing to allow its completion, and pay heavy salvage besides.

Illustrate this from the case at bar. Suppose the salvors had been a few days longer in reaching Boston with the Eliza Lines, and that Captain Andreasen had sailed from St. John for Norway before the bark had been brought into Boston, is there any reason for supposing that the owners of the bark would have made any offer to resume the carriage of the cargo to Montevideo? And suppose they had not. Suppose they had left the salvage proceedings to take their course, their ship to be sold, her whole value when she arrived in Boston was only $2250. (Rec. pp. 65, 207) and the cost of repairing her was upwards of $6600. (Rec. p. 253) the proceeds applied to payment of the ship's salvage, and the balance to them, there would have been no breach of the contract of affreightment, for which the cargo owner would have had any remedy, no matter how great his desire might have been that his cargo should be carried to its original destination, or how great a loss it might have been to him that it should not be so carried.

It is not perceived that the rule adopted in the Circuit Court affords a remedy for any of the evils pointed out in the opinion. The general rule mentioned that, where the master can repair in a foreign port without unreasonable delay or disproportionate expenditure, it is his duty to do it and carry on the cargo, *applies*

only in cases where the master has retained possession of his ship and cargo. It does not apply as above pointed out, when he has parted with the possession of them under stress of an excepted peril, and can regain them only by stipulating to a libel for salvage. But, even according to that rule, if it did apply, the owners of the Eliza Lines would have been under no obligation to repair their ship by the test laid down in the case cited by the learned Justice of *The Assicurazioni Generali* v. *S.S. Bessie Morris Co.* L. R. (1892) 2 Q. B. D. 652, of what is so clearly unreasonable as to be impossible in a business point of view, because, as already mentioned, the cost of repairing the Eliza Lines far exceeded her value.

It is suggested by the learned Justice in the Circuit Court, that the rule of *The Kathleen* might work great injustice in the case at bar, and certainly would in the supposed case of a long voyage nearly completed, and the vessel brought by salvors into the port of destination, or into a neighboring port quite as desirable for the cargo owners, with the cargo intact and a valuable freight lost to the ship and saved to the cargo, without any equivalent or consideration therefor. Cases are quite as likely to arise, however, like *The Arno* and *The Argonaut*, where the greater part of the carriage is performed by the salvor, and, besides, the cargo owner has in any event the burden of the very large salvage, which is usually awarded in cases of derelict, and when he pays that he pays for the conveyance of his cargo a good deal more than the ordinary freight. No illustration is needed of hardship greater than in the case at bar under the rule applied in the Circuit Court. By the result reached the owners of cargo have to submit not only to the loss of their entire cargo, but to pay an additional sum of $5281.30. This, too, is a loss

against which the owner of cargo can hardly protect himself by insurance, while the loss of freight is one against which the ship owner can easily and ordinarily does fully protect himself by insurance. If insured, he is protected against it in the case at bar.

It is said by the learned Justice in the Circuit Court that it was held in the case of *The Leptir*, that the rule would not apply where the abandonment was improper, and that had this been a decision of the court of appeal, it would have brought the rule, as laid down in England, to the absurdly unjust conclusion that the meritorious master who succumbs to the inevitable results of a maritime disaster must lose his freight, while the unmeritorious master may secure it.

It must not be forgotten that Mr. Justice Butt, who decided *The Leptir*, was counsel on the losing side in the case of *The Cito*, and was no doubt touched with the feeling towards that decision, which counsel are apt to indulge in with regard to cases, in which the court has differed from them. But it is submitted with all respect to the learned Justice of the Circuit Court that his criticism of the decision in *The Leptir* is not well founded. Mr. Justice Butt begins the judgment in the case by saying, "I am very clearly of opinion in this case that on the facts there was no abandonment of this ship within the proper meaning of the word, and therefore the case of *The Cito* does not apply." He then goes on to state what he should be strongly inclined to say if there had been an abandonment, which is that the abandonment would have been so improper, that the cargo owners would have been entitled to recover damages against the shipowner for the wrongful act of the crew, "which assumes, therefore, that the contract of affreightment was not thereby put an end to." He then proceeds, "That being so, it follows

that some freight is due." The meaning of this plainly is, that his conclusion follows from the finding that there had been no abandonment, and not from something that he would have said if there had been the occasion for saying it, which he finds there was not. The action was by seamen for wages, and not by the owner for freight. Mr. Justice Butt would hardly have held, even in an action by seamen for wages, that the owners of a ship, which had been wrongfully abandoned and left derelict by her master and crew, were entitled to any freight. He certainly would not have so held in an action for freight. It is clear, too, that if the owners of cargo, abandoned by a master and crew, desired to treat the contract as at an end, and it were essential to the exercise of this right, that the abandonment should have been in consequence of an excepted peril, the owners of the ship would be estopped to deny that the abandonment of her by the master and crew was justifiable, and to assert that it was wrongful. In the case of *The James Martin*, 88 Fed. Rep. 649, where the abandonment had been wrongful and the vessel and cargo had been brought to her port of original destination, Judge Hughes held not only that no freight was due, but that the owners of the ship were liable for the money paid for the salvage and damages to the cargo.

The rule established by the American and English decisions above cited, does not make the right to freight depend in any way on the convenience or the caprice of the salvors, as suggested by the learned Justice in the Circuit Court, in determining whether they shall bring the vessel into the port of destination or into some other port. The general rule is that the salvor must carry his salvage to the nearest port of safety, but wherever he may carry her, we have seen that the cases in both countries hold that there is no

right to freight, when the cargo of a derelict is brought by the salvor to its port of original destination.

The learned Justice of the Circuit Court concedes that the judgment of Judge Ware in *The Elizabeth and Jane* is of great merit, and that it lays down in general terms, but quite positively, the same rule as that given in *The Kathleen*. But he says that it was on the proposition of the right of mariners to wages as against salvage, when there was no correct delivery of the cargo, that the attention of the learned judge was fixed, and that "therefore the precise question in the case at bar was not brought to the attention of the court, and we are unable to say how far the learned judge intended to discriminate between cases where the voyage was broken up by derelict, or by wreck under other circumstances." But the question whether freight was due was the very question that had to be determined in order to settle whether the mariners were entitled to wages.

Judge Ware would have said that it was not of the least consequence whether any effort or attempt was made by the shipowner to earn freight if, in his view, the owner could have established any right to earn it. As between the owner and his seamen, if the owner had a right to earn freight, he was bound to earn it, and must be deemed to have done all that was necessary to entitle himself to it. The owner could not answer to his seamen that there was no freight because he chose not to earn it. The case that the learned judge was dealing with was a case of derelict, and it was as to a case of derelict that he stated the law. Whether any discrimination was applicable to a case of wreck under other circumstances would be for his determination when a case of wreck under other circumstances should come before him.

THE NATHANIEL HOOPER, 3 Sumn. 542.

The learned Justice of the Circuit Court felt that, by the decision in this case, he was justified, or even concluded, to decide against the express decision of Judge Ware in *The Elizabeth and Jane*, and against all the other express authorities in the premises. While admitting that *The Nathaniel Hooper* cannot be relied on as authoritatively determining the law against them "because the result of it was that under the circumstances the court held no freight was earned" he found it, nevertheless, to be an implied authority to the contrary from the circumstance, that the principle contended for is not mentioned in it, and from some of its expressions and general line of reasoning.

We submit with great deference that no such inference can be fairly drawn from the decision in that case. We note in the first place that *The Nathaniel Hooper* is cited with approval and quoted from by Sir Robert Phillimore in his judgment in *The Kathleen* at page 276. It is very clear that Sir Robert Phillimore found nothing in the case at variance with what he stated in *The Kathleen* to be the law. Then, too, it is to be presumed that the decision of Judge Ware in *The Elizabeth and Jane*, and the decisions of the Supreme Court of New York in the cases above cited, were known to Mr. Justice Story. His opinions show that he is familiar with Johnson's reports and often cites from them. The eminent counsel in the case could hardly have been ignorant of these decisions, or have left them unknown to the Judge, if he were not already informed of them. If Mr. Justice Story was, as he must therefore be presumed to have been, aware of these decisions, and if any of the principles declared in them were regarded by him as inconsistent with what he was declaring to be the law in *The Nathaniel Hooper*, it is entirely

inconsistent with his usual practice and habits of judicial exposition, that he should not have commented upon and criticised them. If he found nothing inconsistent in the judgment that he was delivering with the able exposition of the law by Judge Ware in *The Elizabeth and Jane*, including the statement that by shipwreck with abandonment by the crew the contract of affreightment is totally dissolved, and nothing to criticise in Chancellor Kent's decision in *Dunnett* v. *Tomhagen*, where part of the cargo was brought to its port of original destination by the salvor, that no freight was earned because no part of the cargo was delivered by the ship, it is not at all likely that he would have seen any occasion to discuss or to criticise the decisions in *The Kathleen* and *The Cito*, if they had been before him, or to differ from them.

The truth is that in *The Nathaniel Hooper* there was nothing in the facts, to which the principle was applicable that is contended for, that the abandonment by the carrier of the possession of the goods and of his contract of affreightment gives the right to the cargo owner, before the possession of the goods has been restored to the carrier, and while they are still in the possession of the court on a libel by the salvors, to treat the contract of affreightment as at an end. The owners of the cargo of *The Nathaniel Hooper* were not in Boston when the derelict was brought here and libelled for salvage, and had no agents here. They never signified any acceptance of the carrier's act of abandonment, or any determination to treat the contract of carriage as abandoned. Indeed, when the owners of two-thirds of the cargo did afterwards authorize agents in Boston to act for them, those agents addressed a letter to one of the part owners of the ship, asking him to decide either to send the cargo forward to its destina-

tion or not, to which he replied declining to have anything farther done on his part in the business, and Mr. Justice Story said he was not in fault. For the reasons hereinbefore pointed out, the cargo owner had no means of compelling him to have anything farther done on his part. The insurance companies, to whom the remaining one-third of the cargo had been abandoned, after acceptance of the abandonment, applied to the court for delivery to them of this one-third upon stipulation which was granted, no objection being made thereto by any of the parties, but this was after the shipowner had obtained his ship upon stipulation and sold her.

9. THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS.

The learned Judge, who delivered the judgment of the Circuit Court of Appeals, seems to found his judgment and much of his reasoning upon the postulate, that the abandonment at sea by the master and crew was involuntary.

After some general observations on the case he begins his judgment on page 406, "The substantive rights of the various parties are principally involved in the question, whether the involuntary abandonment of the vessel at sea under the circumstances pointed out, operated to terminate the contract of affreightment" &c. and he repeats the phrase "involuntary abandonment" lower down on the same page, and again on pages 407, 409, 410 and elsewhere. On page 407 he begins the paragraph below the middle of the page, "It is apparent that the abandonment of the vessel was not voluntary" &c.

This postulate, with all respect, is wholly incorrect. The master and crew were not swept from their ship

by the waves; nor did they, like Palinurus of old, fall overboard in their sleep. They signalled to a passing vessel and left their bark voluntarily upon Andreasen's request to be taken aboard the other vessel, Rec. p. 26, int. 31. There is no contradiction or qualification to be found in the record of this evidence. That they left under stress of peril of the sea, and in the honest belief that they could no further prosecute their voyage in the bark, does not make the abandonment involuntary in law or in fact, or in any correct use of language. Their acts in cutting away the masts and in jettisoning part of their deck cargo were acts done under stress of peril of the seas, but they were none the less voluntary acts. The act of abandonment was no less voluntary than the act of cutting away the masts. If the act of cutting away the masts, because it was done under stress of peril of the seas, was therefore not voluntary, what becomes of the claim for general average? General average is founded on voluntary sacrifice by the master under stress of peril, and does not exist without voluntary sacrifice. If acts, because done under stress of peril, are therefore involuntary, general average ceases to exist.

Nor is it strictly correct to say, as is said by the learned Judge in the passage quoted, that the question is whether the abandonment of the vessel operated to terminate the contract of affreightment. It was not contended, as already pointed out, that the carrier by his own act alone could terminate the contract of affreightment. The contention was and is, that the abandonment of bark and cargo by the master, the agent of the shipowner, was an abandonment and renunciation by the shipowner of his contract of affreightment so far as he alone can do it, which gave the right to the owner of cargo, at any time before the

shipowner or his agent had regained possession of the cargo, to treat the contract of affreightment as abandoned and at an end, and thus to terminate it by the joint act of both parties.

Again on page 407, the learned Judge says, "It is not altogether clear that the English authorities establish the proposition that the owners of a cargo may, under an involuntary abandonment at sea like the one in question, and in the absence of an actual intention on the part of the shipowner to abandon the vessel, treat the contract of affreightment as absolutely at an end."

In every one of these authorities the abandonment at sea was under stress of the excepted peril, and in every one of them the abandonment was involuntary, if the abandonment of the Eliza Lines by Captain Andreasen and his crew may be correctly termed involuntary.

The meaning of the phrase "in the absence of an actual intention on the part of the shipowner to abandon the vessel" is not altogether clear. If it is meant that the personal intention of the shipowner himself to abandon, as well as the intention of the master as agent in charge to abandon, is necessary, the statement is incorrect. The shipowner himself is not present. He is there in the person of his master, his agent, having full charge and authority from him. In none of the English cases is there any evidence of any personal intention on the part of the shipowner, aside from the intention of his agent, the master, with the act of master and crew. They are all based on the intention of his agent, the master, as his intention binding him, and the cases do clearly establish the proposition, that the abandonment by the master and crew, without in-

tention of returning, under stress of an excepted peril, does give the owners of the cargo the right to treat the contract of affreightment as abandoned and at an end. The abandonment of the vessel and cargo without intention of returning establishes the abandonment by the owner, so far as he can, of the contract of affreightment.

The Arno, 8 Asp. Mar. Cas. 5.

Captain Andreasen testified, Rec. p. 30, + int. 85, that when he left his vessel he could not say that he expected to see her again.

Unless abandonment of ship and cargo, without intention of returning, and without expectation of ever seeing them again, is abandonment at the same time of the contract of affreightment, then abandonment of the contract of affreightment could never be proved. Even if the master should write to the owners of cargo that he with his crew had abandoned ship and cargo on the ocean under stress of an excepted peril, leaving her derelict on the ocean, he would not be likely to add that he had also abandoned his contract of affreightment. It would be superfluous. No master upon abandoning his ship and cargo would be likely to declare in terms that he abandoned also his contract of affreightment. No master would be likely to post a notice on his abandoned ship that in abandoning her he abandoned also his contract of affreightment.

On the same page the learned Judge, after stating it to be apparent that the abandonment of the vessel was not voluntary, adds that it is apparent "that there was no actual renunciation of the contract by the shipowners, neither was there in that respect any actual intention one way or the other involved in the abandonment."

Here again, if the learned Judge means that actual

renunciation by the shipowner personally is necessary, it is clearly incorrect. The renunciation by the master, his agent, in full charge is sufficient. The actual renunciation is involved in the act done by the master and crew. Positive intention to renounce follows necessarily from abandonment with no intention of coming back. When there is no intention to return it inevitably follows that there is no intention to further perform the contract of affreightment.

The whole suggestion of the learned Judge as regards intention is fallacious. Abandonment on the ocean of ship and cargo with no intention of returning is so wholly inconsistent with any intention to further perform the contract of affreightment, that it necessarily includes the intention to abandon and renounce that contract, whether that intention is actually present at the moment in consciousness or not.

If Mr. Ward had met Captain Andreasen when he landed at Port Maitland and asked him if he intended to complete the carriage of his cargo to Montevideo, Captain Andreasen must have answered, "Why, how can I? The masts of my ship were gone, she was helpless and unmanageable, and we had to leave her to save our lives. She is drifting round somewhere on the Atlantic Ocean, and I don't know where."

Again, the learned Judge says on the same page, "It is probably true that, when under stress of weather and circumstances the master and crew were taken from her deck, they acted upon the idea that she was lost, but there was no wrongful intention" &c. He should have said "undoubtedly true" but in the phrase "the master and crew were taken from her deck" is the suggestion of the same fallacy of absence of volition which is expressed in the repeated phrase "involuntary abandonment." The master and crew were not

"taken from the deck" of the Eliza Lines. They voluntarily left it to go on board of a vessel which they had signalled to their assistance.

Nobody ever contended that there was a wrongful intention. If there had been a wrongful intention and the abandonment had been without justification from the excepted peril, not only would the shipowner have been without any right to insist upon resuming performance of the contract of affreightment, but he would have been liable to the owners of the cargo for the expenses of salvage and for all other expenses which might have resulted, and if the cargo had been lost would have been liable to Ward and Company for its whole value.

The Leptir, 5 Asp. Mar. Cas. 411.
The James Martin, 88 Fed. Rep. 649.

On the same page 407 the learned Judge says, "under such circumstances the vessel was picked up by others and without any substantial change in her condition or that of her cargo was brought into the port of Boston." But there had been a very substantial change in the condition of her cargo. By the act of abandonment the cargo had been left derelict and was brought into the port of Boston subject to the large expenses of salvage consequent upon that situation. The learned Judge says on page 408, "The shipowner in no sense, from the beginning of the voyage from Pensacola to the time he asserted the right of repossession at Boston, had renounced the contract between himself and the cargo owners. He had not agreed that the contract should be treated as off." It is true that the owner had not personally in express terms renounced it, but his agent, placed by him in possession of the ship and cargo with full authority, had unequivocally given up

the further performance of the contract under circumstances which excused him, and so in behalf of his owner had renounced it and agreed that it should be treated as off.

On the same page 408, the learned Judge says: "In *The Arno*, as well as in the American case *The Elizabeth and Jane* (15 Fed. Cas. 478) the shipowner had made no effort, nor shown any intention to reclaim the property, at the time the cargo owners interposed."

In *The Elizabeth and Jane*, the report shows that the owner of the ship was the owner also of the goods. There was no separate owner of the goods to interpose. The case was an action by seamen for their wages, which were refused by Judge Ware because no freight had been earned. As already pointed out, Judge Ware would have been quick to say that, if there were a right and opportunity to earn freight, the neglect of the shipowner to exercise the right could be no answer to a claim for wages.

So far from its being true that in the case of *The Arno*, the shipowner had made no effort nor shown any intention to reclaim the property at the time the cargo owners interposed, no case can be found in which such determined effort to that end had been made by the shipowner. The following facts appear in the report of the case, 8 Asp. Mar. Cas. 5.

The Arno was on a voyage from New York to Liverpool. She was abandoned at sea on March 31, 1895, with her cargo. She was found and saved by the Steamship Merrimac. On April 11, the owner of the Arno, having heard of the abandonment, and that the ship had been fallen in with by the Merrimac, obtained an undertaking from the owners of the Merrimac, by which they agreed, on security being given for the

salvage claim, to hold the Arno on her arrival in any port in the United Kingdom for her owner. The owner of the Arno also sent a tug to meet her. The tug fell in with her in the English Channel, put a master on board appointed by the owner of the Arno, and assisted to bring her to Liverpool, her port of destination. April 18, solicitors for the owners of cargo gave notice in writing to solicitors for owners of the Arno that the owners of cargo regarded the contract of affreightment as at an end. April 25, the Arno arrived in Liverpool, and the salvors formally made over possession of the vessel and cargo to the agent of the owner of the Arno. Mr. Justice Bruce finds in his judgment that the owners of the ship, ever since they heard she was in the hands of the salvors, (and this as above shown was a week before the notice given by solicitors for the owners of cargo), had done all they could to assert their claim to carry out the contract so far as possible, and to demand freight.

The learned Judge, on page 409, quotes from the decision in *The Cito* this passage: "We do not decide what would have been the result if, after the ship had been brought in as it was by the salvors, and before the cargo owners had come and exercised their right to the cargo, the shipowner had given bail for the ship and the cargo and had carried the cargo on", and proceeds, "That at least amounts to a query as to the application of the doctrine of *The Kathleen* to a case like the one at bar." But in the case at bar, the ship owner had not given bail for the ship and the cargo and carried the cargo on before the cargo owners had come and exercised the right to their cargo. Ward and Company in the case at bar had exercised their right before the libel for salvage was filed by demanding the

cargo from the salvors and forbidding them to deliver it to the shipowner. When the libel was filed, they had further exercised their right to the cargo in identically the same manner, in which the right was exercised by the cargo owner in the case of *The Kathleen*; that is, by an application to the court for the delivery to them of the cargo upon their stipulation for salvage, without payment of freight. In this respect the case at bar is on all fours with the case of *The Kathleen*. The passage quoted from the decision of *The Cito* amounts therefore to no such query.

The learned Judge further says, page 409, "In *The Leptir* (5 Asp. Mar. Cas. 411) the doctrine of *The Cito* was questioned by the court, for it is there said at page 412 'I do not intend to carry *The Cito* a step farther than it has gone' and, under the circumstances of that case, the owner of the cargo was held liable for the freight."

The Leptir was not an action for freight, but an action for seamen's wages, payment of which was resisted on the ground that freight had not been earned. The facts which Mr. Justice Butt found, as appears in the report of the case, and therefore "the circumstances" under which the owner of cargo was held by him liable for the freight were, *that there had been no abandonment at sea by the master and crew of ship and cargo.* To apply to a case, in which there had been no such abandonment, the decision in *The Cito*, which is founded wholly on such abandonment, would have been to carry *The Cito* not merely one step farther but to carry it across a chasm. If by the remark quoted Mr. Justice Butt meant to question or to criticise the decision of *The Cito*, it is fair to say that he is not an im-

partial critic for the reason that, in the case of *The Cito*, he was the unsuccessful counsel for the shipowner.

We find the learned Judge, near the foot of page 409, assuming that the necessity, for what he calls the harsh rule of the English authorities in respect to derelict property on the ocean, has ceased to exist, and declaring that "the spirit of modern law and present conditions of civilization will justify a closer approximation to a rule of justice" &c.

On the other hand, the learned Justice of the Circuit Court, Rec. p. 199, begins his discussion of these same English authorities by pointing out that the rule they lay down had not found its way into Maclachlan on Shipping or Abbott on Shipping before the year 1875, and declaring that they are subject to examination in the Federal Courts, because they constitute only a modern declaration how the rule ought to be laid down.

There is no justice in the assertion of the learned Judge of the Court of Appeals on page 409, that the rule of *The Kathleen* and of *The Cito* permits the cargo owner to take advantage of the misfortune of the ship owner. The rule is simply, that when there is common misfortune, and when one of the parties takes advantage of the mutually excepted peril to abandon, without thereby becoming liable for a breach, the further performance of the contract, and by parting with possession has put it out of his power further to perform, the other party shall, likewise, be excused by the same mutually excepted peril if he too abandons performance while the first party remains out of possession and so without the power to resume. It is just as fair to say that Captain Andreasen took advantage of the common misfortune to abandon Ward & Company's property and leave it derelict at sea to be sub-

jected, if not finally and forever lost, to heavy claims for salvage.

And why should the rule be stigmatized as a harsh rule? There is nothing in it more harsh than there is in the rule, which adds to the misfortunes of the owner of abandoned and derelict cargo, whose goods have, without fault of his, become, through a common misfortune, encumbered by liens which exhaust or nearly exhaust their value, and who has not taken his goods out of the hands of the carrier, the further misfortune of an obligation to pay a large freight for the carriage of his goods thus encumbered to their original destination, for the benefit wholly, or almost so, of others.

A judgment, which thus deals with the undisputed facts of the case and with the decisions, which bear on the rights of the parties arising from these facts, presenting questions so important to all persons engaged in commerce, is surely one which ought to be re-examined in this court.

The rehearing in the Circuit Court of Appeals was upon the petition of the salvors, shipowner and bondholder, and the matters, Rec. p. 424, which the court was asked to reconsider, and has in its judgment reconsidered, do not involve any of the questions presented upon the petition for a writ of *certiorari*.

L. S. DABNEY,
F. CUNNINGHAM,
for petitioner.

APPENDIX.

THE ARGONAUT.

This was an appeal from a judgment of the President of the Probate Divorce and Admiralty Division on a special case arising out of a claim for salvage brought by the steamship Widdrington for services rendered to the derelict bark Argonaut, which was on a voyage from Halifax on the 22d February, 1883, off the English coast. The question before the court on the special case was whether the owners of the ship and freight were entitled to payment to them of freight in respect of the carriage of the cargo from Halifax from the Western Insurance Company, the owners of the cargo; whether the Admiralty Court having directed the marshal to remove the cargo on board the Argonaut from Plymouth where she was taken by the salvors to Liverpool, her original port of destination, freight was due in respect of the carriage of the cargo, and whether the expenses of the carriage from Plymouth to Liverpool should not be repaid by the Western Insurance Company, the owners of the cargo, to the owners of the vessel Argonaut. The President found by his judgment that no freight was due in respect of the carriage of the cargo from Halifax to Plymouth, but that the expenses of carriage from Plymouth to Liverpool and of the delivery of the cargo at Liverpool should be paid by the owners of the cargo to the owners of the ship.

Mr. A. Cohen, Q. C. M. P. with Mr. Bucknill ap-

peared for the appellants. Dr. Phillimore, Q. C. with Dr. Stubbs for the respondents.

The Master of the Rolls, in giving judgment, said, I am very sorry to differ from the President of the Admiralty Court in this case, but I do. It seems to me that he has been alarmed at the result, not unnaturally, that the cargo owner here, according to the facts found, by reason of the carriage of this cargo of timber to Liverpool has got a much higher price for it than he would have got for it had it remained at Plymouth. Alarmed at that, the President has inferred consent and inferred obligation, which, with great deference, I cannot think he ought to have inferred. The facts of the case are that the cargo is shipped at Halifax, in a bill of lading contract, to carry that cargo to Liverpool. It is a timber cargo, the least perishable of all cargoes. The ship on her voyage from Halifax to Liverpool meets with such weather, that the statement in the case is, that the captain and crew were justified in abandoning her, and did; she was a derelict on the ocean for many days; salvors fell in with her and took her, not to Liverpool, but to an intermediate port, Plymouth, where she was in their hands. Under these circumstances the owner of the cargo applied to have his cargo delivered to him at Plymouth, and stated that he was willing to give bail to the court of Admiralty for the salvage amount for which his cargo would be liable. The court would never insist on the cargo owner giving bail to the whole value of ship, freight and cargo, having the other people before it who would have to give security if necessary. It seems to be clear that the cargo owner under these circumstances, had a right to the possession of his cargo. The possession of the cargo up to that moment had never gone back to the shipowners

at all. Neither had the possession of the ship. The ship was in the hands, first, of the salvors, then of the Receiver of Wreck, then of the Court of Admiralty; and the cargo owner, finding her in this position at an intermediate port, says, "I demand that my cargo should be given up to me, and I ask for the order of the court." I cannot conceive how this case can be said to differ from the cases of the Kathleen and the Cito, which have been referred to, and while the case remains in this court, I consider we are bound by those decisions, founded as they are upon perfect principles of law. The owner, therefore, was desirous to have his cargo at Plymouth, but the court refused to make an order, and said—"We will not make an order to that effect, we shall order that this cargo be carried on to Liverpool." Well, there is no appeal against that order, and therefore we are not at liberty to say that that order was wrong. What we should have done if it had been appealed against, I will not undertake to say. The court orders the cargo to be carried to Liverpool, by the marshal of the court; the crew of the owners of the ship being still on board, the cargo is taken to Liverpool, and then there is an order of court to deliver it up to the cargo owner, upon his application, but the court couples that with saying "We would infer from the fact that you did not apply, and from the fact that you did not bring your case clearly before the Judge of the Admiralty Court at Plymouth that you consented that your cargo should be taken to Liverpool, and upon the terms that you should pay a *quantum meruit* amount on the cargo." This case I think comes within the decision which was made the other day, in point of principle, that if against a man's will you do something which is for his benefit, then there is no inference of law that he is bound to pay for

what you have thus been good enough to do for his benefit. If you do a benefit for a man knowing that he can either decline or accept it, then if he accepts it you may infer that he accepts it upon the terms of paying for it, but if he has no choice you ought not to infer anything. It seems to me, with deference, that the learned Judge ought not to have drawn the inference he did as to the liability of the owner of the cargo, and I think that this appeal must be allowed.

Lord Justice Lindley concurring, the appeal was affirmed, with costs against ship and freight.

Shipping Gazette, Weekly-Summary, Dec. 5, 1884, p. 775. Salvage—The Argonaut. (Before the Master of the Rolls and Lord Justice Lindley, Dec. 3.)

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1904.

IN ADMIRALTY.

No. ~~213~~ 12.

THE ELIZA LINES, HER CARGO AND FREIGHT.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR HENRY P. BOOTH,

SURVIVING PARTNER OF THE FIRM OF JAMES E. WARD & CO.

L. S. [illegible]BNEY,
F. CUNNINGHAM,
of Counsel.

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I.

CONCISE STATEMENT OF THE CASE.

The Norwegian bark, Eliza Lines, Hans Andreasen master, bound on a voyage from Pensacola, Florida, to Montevideo, with a cargo of lumber under charter party containing the stipulation "the dangers of the seas, fire and navigation always mutually excepted" to James E. Ward & Co. of New York, encountered violent storms and heavy seas, lost her bulwarks, became leaky and unmanageable, her masts were cut away, and part of

the deck cargo was jettisoned for the preservation of the bark and cargo, and was finally abandoned at sea, in the Atlantic Ocean, some seventy to seventy-five miles southeast of Nantucket, by her master and crew without any intention of returning to her or expectation of ever seeing her again. The master and crew were taken off at the request of Captain Andreasen by a sailing vessel, to which they had made signals of distress. The bark after floating round derelict for several days was found and picked up by the New York pilot boat Edward E. Barrett, William W. Black master and managing part owner, taken possession of and towed into Boston, arriving there at 2 A. M. September 19, 1889. The master was landed in Nova Scotia, whence he made his way to St. John, N. B. where he received a telegram from his owners informing him that the bark had been towed into Boston and directing him to proceed thither, in obedience to which he went to Boston and arrived there late in the evening of September 21. He testified in his deposition taken in the cause that, when he abandoned his vessel at sea, it was without any intention of returning to her or expectation of ever seeing her again, and that, when he arrived in Boston, he did not have the intention of repairing his vessel and carrying on his cargo to Montevideo, but formed that intention a short time after arrival in Boston when he had taken in the situation.

Ward & Co. and the master respectively sought and demanded possession of the cargo from the salvors, who retained possession of it until they filed their libel hereinafter mentioned, and each of them forbade the delivery of it to the other; and thereupon September 26, 1889, the salvors filed their libel for salvage in the United States District Court for the District of Massachusetts against bark, cargo and freight, and on the same day

the marshal upon a warrant issued upon this libel took possession of the bark and her cargo.

On the next day the master filed a claim praying for the delivery to him of the bark and cargo upon stipulation, and on the same day Ward & Co. filed their claim alleging the abandonment at sea and praying that the cargo be delivered to them upon stipulation without the payment of any freight. October 5, 1889, the vessel was delivered to the master upon stipulation. October 18 the master filed a motion that the cargo be delivered to him upon stipulation, and on the same day Ward & Co. filed a motion that the cargo be sold, setting forth that the value of it was being rapidly diminished by reason of the charges of custody and other costs and expenses, and on the same day hearing was had before the district judge on these claims and motions. November 16, 1889, the judge denied the motion of the master for delivery to him of the cargo, and ordered the same to be sold at public auction on November 29. November 29 the cargo was sold at public auction by the marshal and the net proceeds of the sale paid into the registry of the court, where they have since remained. November 27 the salvors filed in court a petition that Ward & Co. be required to bring into court the chartered freight to answer to the exigency of the suit, and January 16, 1891, they were allowed by the court to file a motion as of November 27, 1889, that the freight money be paid into court, and that Ward & Co. be ordered to file a stipulation to pay it into court, or such portion of it as the court might order, and that the court would rescind and restrain the warrant for sale until such stipulation be given and would order the sale abandoned if no stipulation should be given. On the same day this motion was disallowed by the court as of November 27, 1889.

October 18, 1889, Ward & Co. filed a libel for possession against the cargo.* No process ever issued on this libel but the master of the bark volunteered to appear and file a claim and answer. February 27, 1890, Ward & Co. filed a motion that this libel be dismissed as of November 19, 1889, upon the ground that on that day a warrant had issued for the sale of the cargo. This motion was afterwards allowed by the court and the libel dismissed as of November 19, 1889, and from the decree dismissing it the master appealed to the Circuit Court.

After the order of sale, sundry other libels, petitions and motions, detailed description of which is here unnecessary, were filed; among them a libel by the master against cargo and against Ward & Co. to recover the chartered freight and a general average loss, and a libel against bark and freight by the Banque de Gênes upon a bottomry bond given by the master on the bark and freight at Pensacola.

The District Court ruled and held, that the bark having been abandoned at sea by the master and crew without any intention of retaking possession, Ward & Co. had a right to treat the contract of affreightment as at an end, and that the only remaining interest of the ship owner in the cargo was a claim for *pro rata* freight and for general average; and made decrees against the proceeds of the cargo in the registry for salvage, *pro rata* freight and bottomry, which exhausted the whole fund leaving nothing for the owner

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* It is incorrectly stated in the cross-petition for *certiorari* of Black administratrix and others, that this was a libel by the owners of cargo to recover possession thereof *from the ship owners*. The cargo was not in possession of the ship owners. The libel is *in rem* against the cargo and alleges in the Fourth Article, Rec. p. 120, that the cargo has been unladen and is in the custody of the court as was the fact.

of cargo; but held that Ward & Co. were under no further liability, and refused to make any decree against them personally. From the decrees of the District Court the salvors, master and bottomry bondholder all appealed to the Circuit Court, but Ward & Co. took no appeal from any of the decrees of the District Court.

The following are the numbers in the Circuit Court of these appeals from the District Court:

No. 3545. The appeal of the salvors in the libel for salvage.

No. 3546. The appeal of the master in the libel for salvage.

No. 3547. The appeal of the master in the libel of Ward & Co. for possession.

No. 3548. The appeal of the master in his libel for freight and general average.

No. 3549. The appeal of the Banque de Gênes in its libel for bottomry.

No. 3550. The appeal of the master in the Banque's libel for bottomry.

The Circuit Court after ordering all the libels and proceedings to be consolidated and to be carried along, disposed of and recorded in that court as a single cause, under the title of "The Eliza Lines, her Cargo and Freight," ruled and held:

1. That the justifiable abandonment at sea of the bark and cargo by the master and crew under stress of a peril mutually excepted in the contract of affreightment, without any intention of returning and retaking them, thus leaving the same derelict on the high seas, did not entitle Ward & Co. when bark and cargo had afterwards been saved and brought into port by sal-

vors and libelled for salvage, and before the master or carrier had regained possession of the cargo, to treat the contract of affreightment as abandoned and at an end, and without payment of freight to receive the cargo from the court upon stipulation or to procure the sale of it by the court.

2. That the carrier, in these circumstances, still had the right against the will and objection of Ward & Co. to claim the cargo, receive it upon stipulation and to complete the original voyage.

3. That Ward & Co. in these circumstances, having prevented the carrier from regaining possession of the cargo, although they received possession of it from the salvor or from the court and not from the carrier, are nevertheless liable to the carrier for the net freight that would have been earned under the contract of affreightment if the voyage had been completed.

4. That the District Court erred in ordering a sale of the cargo of the Eliza Lines; that this order having been made upon the motion of Ward & Co. must be deemed to have been made solely in their interest, and not in the interest of any other of the parties; that the master having been by this sale prevented from obtaining possession of the cargo and the voyage having been thereby broken up, Ward & Co. must answer for these consequences and are liable for the net freight, which would have been earned under the charter party by the completion of the original voyage and also for general average.

The case was thereupon sent to a commissioner to compute freight and general average upon these principles; and upon his report the Circuit Court made a decree against the proceeds in the registry for salvage, freight, general average and bottomry, which exhausted the whole fund, and in addition thereto made

a decree against Ward & Co. personally for salvage, freight, general average, bottomry, interest and costs amounting in the whole to $3755.87 in excess of the whole net proceeds in the registry received from the sale of cargo. From this decree all parties appealed to the Circuit Court of Appeals.

The Circuit Court of Appeals ruled and held the law to be as held in the Circuit Court and set forth in the preceding paragraphs numbered in the margin respectively 1, 2, 3 and 4; ordered the Circuit Court to correct its decree by disallowing a credit, which had been allowed to Ward & Co. in the computation of freight and general average, to charge Ward & Co. personally with the additional amount with interest from May 12, 1899; to award forty-five per cent. of the additional sum with interest to the salvors, and fifty-five per cent. thereof with interest to the Banque de Gênes and Hans Andreasen, and in all other respects affirmed the decree of the Circuit Court. By this decree of the Circuit Court of Appeals, Ward & Co. are held personally liable, in addition to the entire net proceeds of the sale of their cargo in the registry, for the sum, including costs, of $5281.30, with some additional interest.

II.

SPECIFICATION OF THE ERRORS RELIED UPON.

The Circuit Court of Appeals erred:

1. Because the court held that the justifiable abandonment of the bark and cargo at sea by the master and crew under stress of a mutually excepted peril, without any intention of returning and retaking them, thus leaving the same derelict upon the high seas, did not entitle Ward & Co. when bark and cargo had been saved and brought into port by salvors, and before the

master or carrier had regained possession of the cargo, to treat the contract of affreightment as abandoned and at an end, and without payment of freight to receive the cargo from the court upon stipulation or to procure the sale of it by the court.

2. Because the court held that the carrier, in these circumstances, still had the right, and was entitled to insist upon it against the will and objection of Ward & Co. to claim the cargo, receive it upon stipulation and to complete the original voyage.

3. Because the court held that, because Ward & Co. in these circumstances, prevented the carrier from regaining possession of the cargo, although they did not receive possession of it from the carrier or from the master, they are nevertheless liable to the carrier for the net freight that would have been earned under the contract of affreightment if the voyage had been completed.

4. Because the court held that, because the District Court erred in ordering a sale of the cargo of the Eliza Lines, this order having been made upon the motion of Ward & Co. must be deemed to have been made solely in their interest and not in the interest of any of the other parties ; that the master having been prevented by the sale from regaining possession of the cargo, and the voyage thereby being broken up, Ward & Co. must answer for these consequences and are liable personally for the freight that would have been earned under the charter party on completion of the voyage, and also for general average.

5. Because said court held that the sale of said cargo was not a sale for necessity under Admiralty Rule No. 10, and was not made in the exercise of its lawful discretion by the District Court in the interest of all parties for the reason set forth in the motion for sale,

to wit, that the value of said cargo was being rapidly diminished by reason of the charges of custody and other costs and expenses.

6. Because the court held that the several claims for salvage, average, freight and bottomry were not confined for their satisfaction to the proceeds in the registry of the sale of the cargo, but that Ward & Co. were personally still further liable, and because the court made a decree against Ward & Co. personally.

7. Because the decree of the court for the satisfaction of the claims for salvage, average, freight and bottomry is not confined to the proceeds in the registry of the sale of the cargo, but in addition thereto condemns Ward & Co. personally to the payment of an additional amount.

The following among the assignments of error of Henry P. Booth on his appeal from the decree of the Circuit Court, (Rec. pp. 374–381,) are the ones, which deal with the subject matters of the errors here above specified.

1. That said court erred in not affirming the decree of the District Court in No. 3545 and No. 3546 *The Eliza Lines.*

2. That said court erred in not affirming the decree of the District Court dismissing the libel as of November 19, A. D. 1889, in No. 3547 *Cargo ex The Eliza Lines*, and in ordering said cause No. 3547 to be consolidated with No. 3545 *The Eliza Lines.*

3. That the court has no power to consolidate the said cause with the others above named, because the said appellants have dismissed on their own motion the libel in said cause, and the said cause is no longer pending.

4. That said court erred in not affirming the decree of the District Court dismissing as against Bradford Darrach and James E. Ward & Co. the libel in No. 3548 *Andreasen* v. *295000 feet of lumber and Darrach et al.* and in ordering said cause No. 3548 to be consolidated with No. 3545 *The Eliza Lines.*

6. That said court erred in not affirming the decrees of the District Court in No. 3549 *The Eliza Lines* and in No. 3550 *The Eliza Lines*, and in ordering the same to be consolidated with No. 3545 *The Eliza Lines.*

12. That said court erred in holding that the court had jurisdiction to make any decree for the payment of money against said James E. Ward & Co.

13. That said court erred in making a decree for the payment of money against said James E. Ward & Co. in favor of William W. Black.

14. That said court erred in making a decree for the payment of money against said James E. Ward & Co. in favor of the Banque de Gênes and of Hans Andreasen.

15. That said court erred in holding that said James E. Ward & Co. are liable personally for the payment of freight and in making a decree against them for the payment thereof.

16. That said court erred in holding that said James E. Ward & Co. are liable personally for the payment of general average and in making a decree against them for the payment thereof.

17. That said court erred in making a decree in favor of Catharine T. Black, Administratrix against said James E. Ward & Co. for $996.33 on account of freight and general average, together with $82.02 interest, and $374.37 for the actual taxable disbursements of said Black on said appeal, and in entering summary judgment in favor of said Black, Adminis-

tratrix against Bradford Darrach, William S. Spaulding and G. Winthrop Coffin for the sum of $200, being the amount of the stipulation entered into by them for costs.

18. That said court erred in making a decree in favor of said Banque de Gênes against whatever sum shall be realized from said James E. Ward & Co. for the sum of $1310.35.

19. That said court erred in making a decree in favor of Hans Andreasen against said James E. Ward & Co. for $1327.63 for costs.

20. That said court erred in making a decree in favor of said Banque de Gênes and Hans Andreasen against the said James E. Ward & Co. for $588.96 being net balance of freight and general average with $386.56 interest thereon.

21. That said court erred in ordering that the said decrees as against said James E. Ward & Co. may be enforced outside of this district wherever the persons of the said James E. Ward, Henry P. Booth and William H. T. Hughes, or either of them, or the goods, effects, credits, chattels or estate of them, or either of them, may be found.

23. That said court erred in holding that the sale of said cargo was not a sale of necessity under Admiralty Rule No. 10.

24. That said court erred in holding that said cargo was not perishable.

25. That said court erred in holding that said sale must be held to have been made on the application of the owner of the cargo not for the common interest, but for his alone.

26. That said court erred in finding that said sale was made without plea or proof or judicial decree.

27. That said court erred in holding that said

James E. Ward & Co. or any owners of cargo had obtained possession of the proceeds of the sale thereof.

28. That said court erred in holding that, said District Court having ordered a sale of the cargo upon the motion of said James E. Ward & Co. said James E. Ward & Co. although they had not obtained possession of any part of the proceeds of said sale, must stand the same consequences as if said cargo had been delivered to them, or as if they had received the proceeds of the sale thereof.

29. That said court erred in holding, when said cargo had been sold under the order of the District Court, that claims for payment of freight and general average were not limited to the proceeds of such sale in the registry of the court, and in making a decree against said James E. Ward & Co. for freight and general average in addition to said proceeds.

30. That said court erred in not holding that the sale of the cargo under the order of the District Court was a breaking up of the voyage.

31. That the court erred in not holding that the sale of cargo made under order of the District Court, was made in the discretion of the court rightfully exercised, and operated as a breaking up of the voyage, and that the order of sale so made could not be appealed from.

35. That said court erred in not holding that the abandonment of the ship and cargo at sea by the master and crew, in consequence of injuries sustained by an excepted peril, without any intention of returning and retaking them, thus leaving the same derelict upon the high seas, did entitle the owners of cargo to treat the contract of affreightment as abandoned and at an end.

36. That the court erred in not holding that the

abandonment of the ship and cargo at sea by the master and crew, in consequence of injuries sustained by an excepted peril, without any intention of returning and retaking them, thus leaving the same derelict upon the high seas, did have the effect of dissolving the contract of affreightment, so that the ship owner could not afterwards insist on being allowed against the will of the cargo owner to carry on the cargo to its destination, or vindicate any title to freight on the ground of such an offer.

37. That the court erred in not holding that any right of the ship owner to carry on the cargo to its destination against the will of the cargo owner was confined and limited to such proportion only of said cargo as was not appropriated or necessary for the compensation of the salvor.

38. That the court erred in holding that after the abandonment of the ship and cargo at sea by the master and crew, in consequence of injuries sustained by an excepted peril, without any intention of returning and retaking them, thus leaving the same derelict upon the high seas, any right remained in the ship owner or master, against the will of the cargo owner, to carry on the cargo to its original destination.

39. That the court erred in not holding that after the sale of the cargo by order of the District Court, the ship owners' claim for contribution in general average from cargo was limited and confined to the proceeds of the sale of cargo in the registry of the court.

40. That the court erred in holding that in the eyes of the law the charterers James E. Ward & Co. without right, broke up the voyage at Boston, when they should have permitted the vessel to reload the cargo and deliver it at Montevideo or Buenos Ayres, according to the terms of the charter party, and that there-

fore the charterers were liable to make good in all respects as though the voyage had been completed.

52. That said court erred in awarding to the salvors against said James E. Ward & Co. the costs of appeal in No. 3545 taxed at $374.37, and in awarding execution against the principal and sureties in the stipulation for costs given by claimants of cargo in the sum of $200, and execution against said James E. Ward & Co. for the balance of $174.37.

53. That said court erred in awarding to Hans Andreasen against said James E. Ward & Co. the costs of his appeal in No. 3546 $129.90, and in including the same in the sum for which execution is directed to issue against said James E. Ward & Co.

54. That said court erred in awarding to said Hans Andreasen against said James E. Ward & Co. costs taxed at $1327.63, and in ordering execution to issue for the same against said James E. Ward & Co. in favor of said Hans Andreasen.

III.

BRIEF OF THE ARGUMENT.

1. THE FACTS OF THE CASE.

The facts are practically not in dispute, and the evidence of them is found mostly in the testimony of Andreasen and of Hughes one of the salvors.

The charter party is found on pp. 35, 36 of the Record.

Evidence of loading of cargo, sailing on the voyage, the storm, leak, loss of bulwarks, cutting away masts and abandonment at sea without expectation of returning.

Andreasen, Rec. pp. 25, 26, 27, 30, ints. 8, 9, 10,

11, 17, 19, 20, 22, 24, 25, 28, 30, 32, 37, 38, 39, 41, 44; × int. 85.

The signals of distress to a passing vessel and the master's request to be taken off with his crew.

Andreasen, Rec. p. 26, int. 31.

The finding and salving of the bark and cargo.

Hughes, Rec. pp. 54, 55, 56, 57, ints. 20, 22, 24, 27, 29, 30, 31, 34, 41, 50, 52, 54, 57, 62.

Information to Andreasen from his owners that bark had been towed into Boston and directions to proceed thither.

Andreasen, Rec. pp. 27, 28, ints 49–51.

When Andreasen left St. John for Boston and when he arrived in Boston he had no intention of resuming or offering to resume performance of the contract of affreightment.

Andreasen, Rec. p. 29, int. 68.

Andreasen came to Boston with his steward and mates, but did not bring his crew which had not yet left St. John, although they had shipped for Liverpool.

Andreasen, Rec. pp. 28, 30, int. 51, × ints. 86, 87, 88.

Bark and cargo remained in the possession of the salvors until taken possession of by the marshal on the warrant from the court issued upon the filing of the libel.

Andreasen, indeed, asserts in various answers, claims, petitions, motions and libels filed by him, that he had resumed possession of the cargo before the warrant was served.

Rec. *Claim* p. 9, *Motion* p. 12b, *Answer* p. 123, *Libel* p. 135.

These assertions are, however, contradicted by his own sworn evidence and that of all the witnesses.

Andreasen, Rec pp. 28, 30, 31, ints. 57, 58, 60, × ints. 91, 92, 93, 95, 96, 97, 98, 99, 102; also p. 77.

Hughes, Rec. p. 59, × ints. 81–88.

Lootz, Rec. pp. 93, 94, × ints. 32–35, 36, 37, 38, 39, 40, 45–50.

The counsel for the salvors claimed in argument in the courts below that the master had regained possession before the service of the warrant, basing the argument upon a statement contained in the return of the marshal on the warrant, that Andreasen was on board and in charge at the time of service of said vessel and cargo.

But the marshal had no jurisdiction to determine who was legally in possession of the cargo and does not assume to determine it. If he did, it would not be evidence against Ward & Co.

1 *Greenl. Ev.* § 498.
Arnold v. *Tourtellot*, 13 Pick. 172.
Lewis v. *Blair*, 1 N. H. 70.
Shannon v. *McMullin*, 25 Grattan, 211.
Johnson v. *Murphy*, 42 Verm. 645.
Worthy v. *Warner*, 119 Mass. 550.
Root v. *Railroad Co.* 45 Ohio St. 222, 232.
Lindley v. *Kelley*, 42 Ind. 294.
Charles City Plow & Manuf. Co. v. *Jones*, 71 Iowa, 234.
The Lindrup, 70 Fed. Rep. 718.

The question is, however, put beyond controversy by the express finding of the Circuit Court that vessel and cargo remained in the actual possession of the salvors until they filed their libel for salvage against the bark, her cargo and freight September 26, 1889.

Rec. p. 175, line 7 *et seq.*

The finding of facts of the Circuit Court was adopted by the Court of Appeals.

Rec. p. 406, line 3 *et seq.*

Workman v. New York City, 179 U.S. 552.

Moreover, the entire opinion and discussion of the subject in both the Circuit Court and the Circuit Court of Appeals is wholly inconsistent with any assertion, that the carrier or his agent had regained possession of the cargo before the service of the warrant of the District Court.

The salvors filed their libel because both master and charterer were making adverse demands for possession of the cargo, each forbidding delivery of it to the other.

Rec. p. 109.

Master and charterer each filed a claim for the cargo at once and on the same day, though the master succeeded in getting his filed first by some minutes less than an hour, because he had the advantage of having for his proctor the same gentleman, who filed the libel for salvage for the salvors, and who thus had the first knowledge of its filing to file his claim for him.

Rec. pp. 109, 110.

2. EFFECT ON THE CONTRACT OF AFFREIGHTMENT OF ABANDONMENT AT SEA.

When the vessel has been abandoned at sea by the master and crew, as was the Eliza Lines in this case,

without any intention of returning to her, the owner of cargo has the right, before the carrier or his agents have regained possession of the cargo, to treat the contract of affreightment as abandoned and at an end, and to receive his cargo without becoming liable for any freight; and this although the abandoned ship and cargo are carried by salvors to the original port of destination.

The Arno, 8 Asp. Mar. Law Cas. 5 (1895) S. C. 72 L. T. (N. S.) 621.
The Cito, L. R. 7 P. D. 5. (1881.)
The Kathleen, L. R. 4 Ad. & Ecc. 269. (1874.)
The Leptir, 5 Asp. Mar. Law Cas. 411. (1885) S. C. 52 L. T. (N. S.) 768.
The Argonaut, Shipping Gazette, Weekly Summary, Dec. 5, 1884, p. 775.
The Elizabeth and Jane, 1 Ware 41. (1823) S. C. 15 Fed. Cas. 478. Case No. 8321.
The Mansanito, 22 Fed. Cas. 594. Case No. 13075. (1861.)
The James Martin, 88 Fed. Rep. 649 (1883.)
Dunnett v. *Tomhagen*, 3 Johns, 154. (1808.)
Post v. *Robertson*, 1 Johns, 24. (1806.)

The report of the Argonaut is not readily accessible and a printed copy of it is annexed as an appendix to this brief.

In *Dunnett* v. *Tomhagen* part of the cargo, and in *The Arno*, the whole cargo was brought by the salvors to the port of original destination, but it was nevertheless held that the ship owner was entitled to no freight.

In the English cases the derelict had been brought into port by salvors and libelled for salvage.

In *The Kathleen* the owners of cargo applied for an order of sale. The owners of the ship offered to give

bail for the cargo, and insisted on a right to carry it to its original destination. Sir Robert Phillimore ordered the cargo sold and held that the carrier was entitled to no freight.

In *The Cito* the ship owner offered bail for the cargo, claiming the right to complete the carriage, but Sir Robert Phillimore ordered it delivered to the cargo owner upon stipulation for salvage, without the payment of any freight, and this order was affirmed on appeal by Lords Justices Brett, Cotton and Lindley. Lord Justice Cotton says in his judgment, "It is true that the ship owners could not by their own act put an end to the contract of affreightment, but by their abandonment they gave a right to the cargo owners to elect to treat the contract as at an end, and the ship owners could not, in my opinion, after their abandonment have objected, if the cargo owners had found another vessel and taken the cargo on in it to the port of destination."

In *The Argonaut* the cargo was carried by the salvor into Plymouth, its original destination having been Liverpool. While it was still at Plymouth, the cargo owner applied for its delivery to him upon stipulation. Sir James Hannen, however, ordered the cargo removed on board the Argonaut from Plymouth to Liverpool, where it appeared that a higher price could be obtained for it than at Pymouth, and then ordered the cargo owner to pay to the owners of the ship the expenses of the carriage from Plymouth to Liverpool, while denying to the ship owner any other freight. This order was reversed by the Court of Appeal, the Master of the Rolls and Lord Justice Lindley holding that the cargo owner was entitled to the delivery which he had asked for at Plymouth, without the payment of any freight, and was not liable for the expense of the carriage from Plymouth to Liverpool. Brett, Master of

the Rolls, afterwards Lord Esher, says in his judgment in this case that the decisions in *The Kathleen* and *The Cito* are founded upon perfect principles of law.

In *The Arno* the ship and cargo were brought by the salvor to the port of original destination. Mr. Justice Bruce in his judgment puts the matter thus: "The real question is whether, so far as the owner of the ship is concerned, there was on his part, or on the part of his servants, an act done so clearly indicating his intention not to carry out the contract as to entitle the owners of the cargo to treat that act as putting an end to the contract." And he held that the abandonment of the ship and cargo at sea under stress of an excepted peril, without an intention to return, was such an act, and ordered the delivery of the cargo to the cargo owner without the payment of any freight, which was affirmed on appeal by Lord Esher and Lords Justices Kay and Smith.

In *The Leptir* Mr. Justice Butt found that there had been no abandonment of the ship and cargo by the master and crew, that if there had been abandonment it would not have been justified by the circumstances, but would have been a breach of the contract of affreightment, and therefore the principle of *The Cito* did not apply.

Dunnett v. *Tomhagen* was an action by seamen for wages. The ship and part of the cargo had been abandoned at sea from necessity by the master and crew who left in a boat, and part of the cargo was taken in the boat. They were picked up by a vessel called the Morning Star and brought with the cargo which had been saved to New York, the port of original destination, and there the merchandise, which had been saved was libelled for salvage by the crew of the Morning Star. Wages were claimed on the ground that freight

had been earned on this part of the cargo, and they were allowed upon this ground in the court below, but the decision was reversed by the Supreme Court of Errors composed of Chief Justice Kent and Judges Thompson, Spencer, Van Ness and Yates. Chief Justice Kent delivering the opinion of the court said: "No freight was earned because no part of the cargo was delivered by the ship. A salvor and not the ship owner was here the deliverer of the goods saved."

Post v. *Robertson* was an action to recover freight claimed to be due under a charter party. The ship and cargo had been abandoned at sea by the master and crew, and brought by salvors into the port of New York, which was the port of original destination under the charter party, and there libelled for salvage. The cargo was sold by order of court, half the proceeds paid to the salvors, the other half to the owner of the cargo. Chancellor Kent, with Judges Thompson, Spencer and Daniel D. Tompkins, held that no freight was due under the contract, but suggesting without deciding, that a promise by the owner of the goods to pay a *pro rata* freight might be implied from his acceptance of the goods from the salvors, entered a nonsuit, leaving the question open. Mr. Justice Brockholst Livingston dissented from this suggestion, holding in a strong opinion that no freight was due either contract or *pro rata*, and that judgment should be entered for the defendant. Mr. Justice Livingston in this judgment, commenting on Lord Mansfield's judgment in *Luke* v. *Lyde*, and criticising it, says, "If *Lyde* had taken his goods out of the hands of the master, there might be some reason for adding to his other misfortunes that of the payment of freight; but receiving them of the salvors, in preference to a total dereliction, could never form the basis of a claim on the part of one who had

entirely failed in his contract, which was to *carry* them to *Lisbon*. It was a demand sanctioned neither by the contract nor any one principle of justice." He also says in his judgment: "The charter party was dissolved from the moment the vessel was abandoned."

Judge Ware considers that the suggestion of the majority of the court in *Post* v. *Robertson*, that some freight might be due under an implied promise, was overruled by the later decision of the same court in *Dunnett* v. *Tomhagen*.

The Elizabeth and Jane was also a proceeding for mariners' wages. There, too, the brig and cargo had been left derelict at sea by the master and crew, and brought in by salvors. There, too, wages were claimed on the ground that freight had been earned on the cargo which had been saved, but Judge Ware refused to allow them, saying, with respect to the contention that freight had been earned, "In answer to this argument, it may be said that the principles before stated apply with as much force to the question of freight as wages. The merchant receives his goods but with the deduction of salvage, and they are delivered not by the ship owner, but by the salvor. The possession of the salvor deprives the carrier of the capacity of performing this essential part of the contract. On the whole it seems a fair deduction from these premises that, by shipwreck, with abandonment by the crew, the contract is totally dissolved. Such seems to me to be the legitimate inference from the acknowledged principles of the marine law; and so the law is stated by the learned editor of Abb. Shipp. p. 512."

One of the principles referred to in the above as before stated, had been stated by the learned judge as follows: "But it is from the salvor only that the owner can receive his goods, and to the owner only is the salvor

accountable. The master and the mariners having lost the possession cannot resume it. These are familiar and well-established principles of the marine law."

In the case of *The Mansanito* the derelict had been brought in by salvors and libelled for salvage. The owners of the vessel gave notice to the owners of cargo that they held themselves in readiness to forward the cargo to its destination. The cargo which was iron having been afterwards sold under the order of the court, the owners of the vessel applied for payment to them of freight out of the proceeds, and it was refused by Judge Shipman.

In the case of *The James Martin* the vessel and cargo had been abandoned on the high seas, when the greater part of the voyage had been performed, and had been brought by salvors to the port of destination. Judge Hughes found that the abandonment was unwarranted, and not only refused all freight to the ship owner, but condemned him to pay the amounts paid for salvage and as damages to the cargo.

When Captain Andreasen thus abandoned the bark and cargo on the high seas, he abandoned for himself and his owners so far as he could the contract of affreightment. He abandoned possession and he and his owners were without power to further perform the contract.

It is the abandonment of his possession by the master, when he abandons his ship and cargo at sea without intention of returning, thus putting it out of his power to complete the performance of the contract of affreightment, which deprives him of the right to insist upon carrying it out, at least until he is restored to possession so that he is at full liberty to proceed with his contract.

The owner of cargo, when the master has thus parted with the possession, is under no obligation, either by his contract or by the relation of the parties, to restore the possession to the master or to abstain from interfering to prevent the possession from being restored to him. When the owner of cargo receives possession of it from the salvor, after the abandonment by the master, or from the court upon stipulating for salvage, or by the sale of it under order of court and the payment of proceeds into the registry, if that may be said to give the owner of cargo possession, such possession is not obtained or taken from the master, but is obtained from the salvor or from the court, and there is no delivery by the carrier. It imposes no obligation on the cargo owner to restore it to the master and the obligations and liabilities of the owner of cargo to the carrier, when he receives possession of it at an intermediate port from the master, afford no measure of and throw no light upon the cargo owner's rights, obligations or liabilities when he receives that possession, not from the master or from the carrier, but from the salvor or from the court.

According to the decision of the Circuit Court of Appeals, if Ward & Co. had been informed of the abandonment at sea by the master of the Eliza Lines and her cargo, and had thereupon sent out a tug which had found and brought bark and cargo into port, the owners of the Eliza Lines would have still had the right, within a reasonable time, to insist upon carrying the cargo to its original destination and earning the freight.

There can be no question, that when the master and crew left the bark and cargo floating derelict on the ocean with no intention of returning, it was an abandonment by the ship owner through his agent of the

contract of carriage, and a renunciation of that undertaking. This does not depend in the least upon any question of the intervention of an excepted peril. Peril or no peril, the abandonment of possession with no intention of resuming it must inevitably be a renunciation of the undertaking to carry. The intervention or non-existence of an excepted peril determines only whether the abandonment was justified by the contract or was a breach of it.

It is the general rule, that after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any further performance of it, retaining his right to sue for any damages he has suffered from any breach of it.

Roehm v. *Horst*, 178 U. S. 1.

If the abandonment by her master and crew of the bark Eliza Lines and cargo had not been justified by a peril excepted in the contract of affreightment, the cargo owner had an immediate right of action against the carrier, and this right of action could not have been defeated by any subsequent offer or attempt of the carrier, if the cargo afterwards happened to come within his reach, to resume performance of his contract and complete the carriage.

Roehm v. *Horst*, 178 U. S. 1.

In determining what were the rights of the owners of the cargo of the Eliza Lines upon this abandonment of their property and renunciation of the contract by the agent of the ship owner, it is necessary to determine what those rights were only while the carrier remained out of possession of the property, which his

agent had thus abandoned, because when the sale of the cargo was ordered by the District Court, possession of it had never again been obtained by the carrier after the abandonment of it by his agent.

If before any assertion by Ward & Co. of their right to treat the contract of affreightment as at an end, the carrier or his agents had succeeded in regaining possession of the cargo and thus regaining power to carry out the contract of affreightment, the question would have been a different one, and it is not necessary to determine that, in the case thus supposed, Ward & Co. would still have been entitled to treat the contract as at an end. Ward & Co. from the beginning made clear their intention to treat the contract of affreightment as abandoned in accordance with their right.

If the contract was at an end by the abandonment at sea, or if Ward & Co. had the right so to treat it, then that contract could not be revived or renewed against the objection of Ward & Co. and possession taken by the master against the wish or without the consent of Ward & Co. would be of no effect.

No decision as to the obligation of the cargo owner to pay full freight, if he takes his cargo from the carrier at an intermediate port in case of disaster or for any other reason, when the carrier has at no time parted with the possession of it, and no decision as to the rights of the parties in cases of shipwreck or other disaster, where the carrier has always retained the possession and thus the power to continue performance of his contract of carriage, has any application in this case because this controlling feature of continued possession is lacking from it.

The question of obligation to repair and furnish money to complete the voyage, so long as the carrier and his agents have not abandoned the possession and

the undertaking, is a question of what will justify the carrier in abandoning the contract of carriage or of what will release him from the obligation to complete it. The principles involved in that question can, of course, have no application when the carrier has already abandoned the possession and the contract of carriage upon the happening of an excepted peril.

Nor are the decisions of prize courts in cases of capture applicable. In cases of capture the possession of ship and cargo is forcibly taken from the master and crew and not abandoned by them. The reasons are given in the judgment, p. 198, of the learned Justice of the Circuit Court when he says "because capture is not under ordinary circumstances the equivalent of derelict. In capture there is no such abandonment as that which, according to the authorities cited by James E. Ward & Co. form the basis of a dissolution of the contract of affreightment. If the vessel and cargo are restored after being captured, it is by virtue of the *jus postliminii*, which it may be said is not analogous to the rights of the owners in a derelict brought in by salvors." And Mr. Justice Story says in *The Nathaniel Hooper*, 3 Sumn. 542, "But it is not safe or correct in many cases to reason from the peculiar doctrines arising out of the administration of international law and policy in courts of prize to the ordinary exigencies of commerce, or the ordinary interpretation of common civil contracts. Courts of prize exercise a very peculiar and extensive jurisdiction *sui generis* upon very enlarged views, and a sort of international discretion, which do not belong to the common functions of other courts, or even of courts of admiralty in the exercise of their jurisdiction as instance courts."

3. THE CARRIER NOT BOUND TO RESUME THE VOYAGE.

If the act of strangers in saving vessel and cargo can

operate as a revocation of the abandonment at sea, that revocation should be for the benefit of both parties alike, and not for the benefit of only one of them ; yet while, by the decision of the Court of Appeals, the ship owner without regaining possession still has the right to resume the voyage against the will of the cargo owner, the cargo owner cannot compel the ship owner to resume against his will. When the derelict has been saved and placed by the salvor in the custody of the court, the carrier, if the abandonment of possession has been under stress of an excepted peril, has committed no breach of his contract, is under no obligation to resume performance of it, and the owner of the goods has no remedy.

The carrier is not bound to stipulate for the cargo or even for his own ship. He can without any breach of contract leave the salvage proceedings to take their course and let his ship be sold to pay the salvage. It is so expressly decided in *The Nathaniel Hooper*, 3 Sumn. 542, and no trace of any contrary doctrine can be discovered in any text book or in any adjudged case.

The owner of cargo may stipulate for his cargo but he has no right to stipulate for the ship. If he find her derelict upon the high seas with his cargo on board, he has no right to take possession of her except as a salvor : certainly not for the purpose of completing the carriage of his cargo.

The Arno, 8 Asp. Mar. Law Cas. 5.

The freedom of the carrier from obligation to resume is because he has justifiably renounced performance by the abandonment under stress of the excepted peril. No other thing has intervened to release him from his obligation on the contract of affreightment. It necessarily follows, therefore, that the cargo owner has the

right to accept and act upon the renunciation, at least until the carrier has regained possession and so placed himself in position to resume performance. When the carrier has regained possession he may be bound for the further performance of his contract, unless some new event constituting an exception shall release him. The peril which excuses the owners of the Eliza Lines is a mutually excepted peril and ought to excuse Ward & Co. so long as it excuses the owners of the bark, which thus appears to be until they regain possession.

4. UNIFORMITY OF LAW AND DECISION DESIRABLE.

The question presented of the respective rights of cargo owner and ship owner, when a ship and cargo, which have been abandoned at sea without any intention of returning by the master and crew under stress of a peril mutually excepted in the contract of affreightment, have been afterwards found and brought into a port of safety by salvors, while possession of it remains in the salvors and in the court and before possession of it has been regained by the carrier, is a grave and important question of commercial law of the utmost interest to all persons engaged in commerce and navigation.

The right of the owner of cargo after such abandonment at sea of ship and cargo, at any time before the carrier or his agents have regained possession of the cargo, to treat the contract of affreightment as abandoned and at an end, is the settled law of England unquestioned and uncontradicted by the decision of any court in that country. If the Eliza Lines had been taken by the salvors to a port in Nova Scotia or in New Brunswick instead of into Boston, and the same proceedings had there followed as followed in Boston, the master would have had no right to receive the cargo

from the court against the objection of Ward & Co. and if sold by the court upon the motion of Ward & Co. even if made solely in their own interest, all claims for salvage and general average would have been limited to the proceeds of sale in the registry of the court; the carrier would have been entitled to no freight and of course there would have been no claim against Ward & Co. by the bottomry bondholder, for the only justification of the decree against Ward & Co. in favor of the bottomry bondholder is the consolidation of the causes. Ward & Co. are not made parties to the bondholder's libel, and can in no way be liable on the bond. By all the express decisions in this country until the decision of the Circuit Court in this case, the same right is recognized of the owner of cargo to treat the contract of affreightment as abandoned and at an end after the abandonment by the carrier of ship and cargo upon the high seas, at any time before the carrier has regained possession.

The learned judge of the Court of Appeals, in his judgment, relies upon certain comments made by text writers upon the English decisions, and particularly the text writer Mr. Wendt in his work on Maritime Legislation. When a text writer like Mr. Wendt undertakes thus to criticise the considered judgments of Lord Esher, Lords Justices Cotton, Lindley, Kay and Smith, Sir Robert Phillimore, Sir James Hannen, Mr. Justice Butt and Mr. Justice Bruce, one is reminded of the remark made by Mr. Justice Gray delivering judgment in *Kimball* v. *Aetna Ins. Co.* 9 Allen, 540, where he says at p. 551, "This subject illustrates the wisdom of the common law in taking for its guides judicial opinions, given after argument, under the responsibility of determining the rights of parties in actual controversies, rather than the theories of scholars and commentators,

however learned or acute."

Mr. Carver, in his third edition of Carriage by Sea, refers of course to the decision of the Circuit Court in this case just as he refers to the other decisions on the subject. It is somewhat interesting to note that Mr. Carver, whatever may be his academic views of the question, was himself counsel for the cargo owner in *The Arno*, 8 Asp. Mar. Cas. 5, the latest English decision on the subject, and the one which carries the rule farther than it had been carried in any previous decision, holding that the ship owner was entitled to no freight, although the ship had been carried by the salvors to the port of destination, and although the ship owner, as soon as he heard that his abandoned ship had been fallen in with by salvors, obtained from the owners of the salving vessel an agreement, on security being given for the salvage claim, to hold the Arno on her arrival at any port in the United Kingdom for her owner; and although the ship owner had succeeded in putting a master appointed by him on board the Arno in the Channel before her arrival in port; and although the ship was formally made over to his agent by the salvors upon her arrival in port.

In these days when uniformity of law, especially in commercial matters, is deemed of so much importance and is so anxiously sought; when such earnest efforts are making by associations of lawyers and other interested persons to bring it about by legislation and by treaty between commercial nations, it would seem to be particularly unfortunate for this country to adopt a rule, on a question of this importance, directly contrary, to the settled and established law of the English courts, when that law of the English courts works no injustice and is not only not obnoxious to any decision of our

courts, or to any principle followed by our courts, but actually has the support of all the express decisions on the subject of the courts of this country down to the decision of the Circuit Court in this case.

5. THE VOYAGE OF THE ELIZA LINES COULD NOT AFTER THE ABANDONMENT BY THE MASTER AND CREW BE RESUMED, AS CONCERNS THE CARGO OWNER, WITH THE SAME CHARACTER OF A TRANSACTION OF COMMERCE.

When Ward & Co. shipped their cargo from Pensacola for Montevideo, the adventure and the voyage of the bark were an ordinary transaction of commerce. When the masts had been cut away and the bark damaged by the storm, with part of the deck cargo jettisoned, had been abandoned by the master and saved and brought into Boston and libelled by the salvors, these circumstances necessarily worked an entire change. The damage to the cargo with the charges for salvage and general average would of course exceed, and did in fact far exceed, fifty per cent of its value, and worked a constructive total loss of cargo. Ward & Co. abandoned to their underwriters, the Atlantic Mutual Insurance Company, the underwriters accepted the abandonment, paid a total loss adjusted at $4560, and took an assignment of the cargo.

Rec. pp. 41–47.
Dunham, pp. 47, 48, Ints. 1, 2.
Chapman, pp. 50, 51, Ints. 1, 2.

There is no commercial enterprise in the carriage to Montevideo of a cargo thus abandoned to underwriters. The Insurance Company is not in the business of sending lumber to Montevideo for sale. Their only inter-

est is, after satisfying the liens, to realize as much as they can and as soon as they can from what has been abandoned to them. What justice is there in compelling the underwriter to pay for the transportation to Montevideo of a cargo encumbered by liens far exceeding half its value, that is, to pay for its carriage for the benefit of others, and not for his own benefit? The amount awarded for general average $2225.24, Rec. p. 248, alone exceeds the gross proceeds of the sale of the cargo, which amounted to $1825, Rec. p. 14. If it be claimed that the insurer must bear this because he succeeded to the obligation of the insured, what justice is there in compelling Ward & Co. to pay for the carriage to Montevideo, for the benefit of others, of a cargo thus emptied of its value? And this destruction of the character of the enterprise was by the peril of the sea, which disabled the bark and obliged the master to abandon her, and is mutually excepted in the contract of affreightment. The proceedings are in the name of Ward & Co. but the underwriter will have to bear the burden of any personal decree against Ward & Co. besides paying for a total loss.

Rec. p. 15.

6. WARD & CO. NOT LIABLE TO ANY DECREE AGAINST THEM PERSONALLY.

Ward & Co. thus having the right and exercising it to treat the contract of affreightment as at an end, and to receive their cargo, or to have it sold, without the payment of any freight, it necessarily follows that they are not liable personally and that no decree can properly be made against them personally. They are not liable upon any express contract and can be liable only upon an implied contract, to pay for benefits received

by services rendered to or sacrifices made to save their cargo.

Ward & Co. might have taken their cargo upon stipulation subject to the claims for salvage and general average, but they were not bound to do so, and had a perfect right to have the cargo sold by the court and the proceeds of sale applied to the satisfaction of these claims. The cargo having been sold and the whole proceeds of the sale being in the custody of the court, the claims for salvage and general average must be limited to those proceeds. Those proceeds represent the full value of the goods in Boston, and include all possible benefit conferred upon the owner of them by the salvors or by the average sacrifice. The basis of the salvage claim as well as of the claim for average contribution is, that property has been saved for the owner's benefit. No owner, none of whose property comes to his hands, is liable personally for salvage or for general average, and when all the property saved has been exhausted in the satisfaction of the claims for salvage and general average, the liability of the owner of it has reached its vanishing point.

Flaherty v. *Doane*, 1 Lowell, 148, 150.

The salvor is paid because he saves something for the owner. General average is paid because something has been saved for the owner by the sacrifice for the common benefit. When nothing is saved for the owner he is not benefited, and is under no liability. By the decree of the District Court, from which Ward & Co. claimed no appeal, their whole property is taken from them and they get nothing. They therefore received no benefit from the salvors or from the average sacrifice, and are under no further liability.

The District Court made a decree in favor of the carrier for *pro rata* freight. This was error. Both logically and according to the authorities cited abandonment puts an end to *pro rata* freight as well as to contract freight. But, as the decree was confined for its satisfaction to the proceeds in the registry of the sale of the cargo, Ward & Co. did not appeal from it. Any claim for *pro rata* freight is necessarily confined to the proceeds of sale in the registry for the same reasons that claims for salvage and general average are so confined. *Pro rata* freight, when the carrier has not performed his entire contract of affreightment, rests upon the theory that the owner of the cargo has been benefited by part carriage, and should therefore pay for it. As none of the cargo in this case came to the possession of Ward & Co. and as the whole proceeds of the sale of it were by the decrees of the District Court awarded to others, it is quite clear that Ward & Co. received no benefit from the part carriage, and the court was quite right in confining the decree for *pro rata* freight to the proceeds in the registry for its satisfaction, and in refusing to make a decree against Ward & Co. personally. The proceeds in the registry represented the full value of the goods in Boston and included all possible benefit conferred upon the owner of them by the carriage of them from Pensacola to Boston.

The bottomry bondholder, of course, had no personal claim against Ward & Co. and the decree against Ward & Co. for bottomry must rest wholly upon the consolidation of the causes, and convenience in the distribution of the amount awarded against them.

7. LEGAL EFFECT OF THE SALE OF CARGO BY THE COURT.

Whatever may have been the rights of the parties

to the contract of affreightment, the vessel after arrival at Boston came into the custody of the court upon a libel for salvage, in which the salvors prayed that the vessel and cargo might be sold and salvage awarded from the proceeds.

Record, p. 7*d*.

Ward & Co. also came in and moved that the cargo be sold, and this motion and order of the court thereon appear from the record to have been made, *not* on the ground that Ward & Co. were entitled to possession, and therefore could demand the sale of the property by the court for their benefit, but because on hearing all the parties, the court in its discretion concluded, that it was for the interest of all concerned, that the cargo should be sold and not delivered to either the cargo owner or to the ship owner upon stipulation.

The reasons given in the motion are *not*, that the cargo owner had the right of control and asked for a sale on that ground, but that the value of the cargo was being rapidly diminished, a thing contrary to the interest of salvors and also of the ship owners in view of their claim for general average contribution.

Record, p. 13.

" p. 136, Art. Tenth.

The motion was made in the suit for salvage and there was a formal hearing upon it October 18th, 1889, at which evidence was adduced, and at which counsel for all the parties were present and were heard upon the question, whether the cargo should be delivered to the cargo owner or to the ship owner or should be sold.

Record, pp. 76, 77, 78.

It would seem that the learned Justice of the Circuit

Court must have overlooked these facts, when he says in his opinion

(*a.*) That the salvors did not apply for a sale.

Record, p. 177.

While it does not appear that they filed a motion for a sale, they asked for a sale in their libel and could not object to one or appeal from an order, which is in pursuance of their express prayer.

(*b.*) That the sale of the cargo was not a sale for necessity under the Rules.

Record, p. 177.

If it was for the benefit of all concerned it was a sale for necessity within the meaning of the Admiralty Rules.

(*c.*) That it was made only in the interest of the cargo owner.

Record, p. 178, at middle.

(*d.*) That it was made on a summary order and without plea or proof or judicial decree on an issue solemnly made.

Record, p. 179 at middle.

For the District Court had before it at the time of the hearing and considered the libel for salvage, the ship owner's motion to bond, the cargo owner's motion to bond, and the cargo owner's libel for possession, and heard evidence in the matter.

See Certificate of District Judge, Record, p. 78.

If the District Court had been deciding the question upon the right to possession, it would have delivered the cargo to the cargo owner and would not have ordered a sale; nor would the court have later ordered Ward & Co.'s libel for possession dismissed as of November 19, 1889, the date of the order of sale.

With all due respect to the learned Justice of the Circuit Court, one of the best established and beneficent powers of the Admiralty Court has always been that of ordering a sale upon the happening of a maritime disaster, after hearing all persons concerned. This power has been exercised for the very purpose of settling the question of the necessity and taking the responsibility from the shoulders of any one interested in the adventure; and while it is oftenest invoked by the master in order to relieve himself from responsibility, as for instance in selling cargo to obtain funds to carry on the voyage, it may be invoked by a cargo owner or by any one else who is interested.

2 Parsons on Shipping & Admiralty, pp. 338 *et seq.*

Benedict's Admiralty Practice, 3d Ed. Sect. 299.

The Fanny & Elmira, Edward's Adm. Rep. 117.

The Gettysburg, 5 Asp. Mar. Law Cas. 347.

Janney v. *Columbian Ins. Co.* 10 Wheaton, 411, 418.

Dorr v. *Pacific Ins. Co.* 7 Wheaton, 581.

Dunlap's Adm. Prac. p. 64.

When the master sells upon a marine disaster, even without any legal proceedings, if it be done *bona fide* for the benefit of all concerned, the sale is upheld as against all persons, even though as a matter of fact it turns out to have been unfortunate.

The Amelie, 6 Wallace, 18.

Post v. *Jones*, 19 How. 150.

Yet in this case, when a sale has been made in a port of refuge by order of an admiralty court upon due

proceedings, and after hearing all persons interested, the Circuit Court rules that it must be assumed to have been made, unless the cargo is technically perishable, in the interest of the party moving it, and that that party is liable for the consequences of it.

Record, p. 178.

It is hard to understand the citation of the case of the Schooner Tilton in support of the proposition, to which it is cited by the Circuit Court at the bottom of page 178. It was a libel *in rem* for possession by owners of a vessel, which had been stranded and sold by a wreck commissioner, acting in collusion with the master and without necessity, and where the purchasers were affected with notice of the circumstances. The court held that the sale was invalid. It was not, as would appear from what is said about it by the Circuit Court, an action on a bill of lading and no question of liability on a bill of lading arose in the case. The vessel was in ballast and had no cargo aboard, so none was sold. It was not a judicial sale by order of an Admiralty Court and no question of failure of the owners to have funds or of fault of the owners in any way was involved in the case. It seems to have no bearing upon the proposition to which it is cited, namely, that "on a sale of any part of a cargo in a foreign port by authority of the admiralty, if it transpires that the owner ought to have had funds in that port, or was otherwise at fault, then notwithstanding the sale was by an order of the court, the master by applying for and securing it subjects his vessel to a liability on the bill of lading."

The assumption of the Circuit Court, that the District Court, sitting in admiralty and having all the parties in interest before it and contesting, made an order

wholly in the interest of one of the parties is, to say the least, somewhat unwarranted.

It is quite within the bounds of possibility that a case might arise, where two contending parties claimed the right of possession of a vessel and that neither was able to bond her, and it might be made apparent to the court, that owing to difficulty of getting evidence or other cause of delay, the value of the vessel would be entirely exhausted by the expenses of custody before a decree could be entered, and that she could be sold to great advantage at the time of the application for a sale. If, in such circumstances, the court ordered a sale it certainly could not be contended for a moment, that the party making the application was liable to the other for the consequences.

It is not apparent how such a case would differ in principle from the case at bar.

The grounds for the motion for a sale were well known and valid grounds and grounds, on which the courts have frequently ordered sales. There is no absolute right in case of salvage to a delivery of the property on stipulation.

300 Tons of Iron Ore, 38 Fed. Rep. 36, 42, 43.
The Nathaniel Hooper, 3 Sumn. 542, 562, 563.
The Mendota, 14 Fed. Rep. 358.
The Kathleen, L. R. 4 Add. & Ecc. 269, 272.
The Lion, 1 Sprague, 399, 401.

If the District Court after the hearing on the question of right to possession had ordered the cargo delivered to the cargo owner on stipulation, which covered only the value of the cargo at Boston, the consequences to the ship owner would have been the same, and yet it would hardly be contended, that the Circuit Court, on appeal, could award damages to the ship owner for

such action of the District Court.

There can be no difference in principle between a sale and a delivery on bail.

If the cargo had been detained in custody pending the suit since 1889, the allegation in the motion for a sale would have been amply justified.

The opinion of the Circuit Court seems to imply, that the action of the District Court in ordering a sale was an extra, judicial act, taken *in pais* by the court acting as the agent of the cargo owner, for if it was a judicial act the cargo owner certainly cannot be responsible for its consequences.

In proceedings *in rem* the allowance of process is the act of the law, so that no damages are allowed for the arrest and detention of a vessel, unless there is bad faith or deceit practiced in suing out the warrant, or the suit is one that may be characterized as a malicious prosecution.

The Alex Gibson, 44 Fed. Rep. 371, 374.
The Adolph, 5 Fed. Rep. 114.
Kemp v. *Brown*, 43 Fed. Rep. 391.
The Wasco, 53 Fed. Rep. 546.
Henry Adm. p. 337.

Where a sale *pendente lite* is fairly made upon a valid order of the court, to prevent the property being eaten up by charges, it protects all parties equally with the purchaser.

300 Tons of Iron Ore, 38 Fed. Rep. 36, 42, 43.
American Ins. Co. v. *Johnson*, 1 Blatchf. & H. 9.

The sale is the act of the court in a somewhat higher sense than an arrest under process, because made on special order.

300 Tons of Iron Ore, 38 Fed. Rep. 36, 42.

And is presumably for the benefit of all concerned.

300 Tons of Iron Ore, 38 Fed. Rep. 36, 43.

Pollard v. *Baker*, 101 Mass. 259.

The mere dismissal of the original suit or a reversal on appeal, on grounds not affecting the jurisdiction, do not affect the validity of sales *pendente lite*.

300 Tons of Iron Ore, 38 Fed. Rep. 36, 42.

In a strictly judicial sale the court itself is properly the vendor, and the sale, in so far as the owner of the property is concerned, is an involuntary one.

Kleber on Judicial Sales, sect. 2, pp. 58, 59, and cases cited.

Sales in admiralty are strictly judicial.

Kleber, sect. 9, p. 62.

The following words, near the bottom of page 73 of the record "in pursuance of which the decree entered Nov. 16, 1889, ordering a sale of the cargo was entered," in the sentence following the certificate of the clerk, and preceding the copy of Judge Nelson's opinion, are an impertinent interpolation. They do not purport to be any part of the opinion, or of the record, are not certified by the clerk, and should be struck out. There is nothing properly in the record to show that the motion for an order of sale was allowed upon any grounds other than those stated in it, and in the prayer in the salvor's libel (p. 7*d*) that the court should order said cargo to be sold.

And as seen above, the sale has been amply justified on that ground by the length of time, which has elapsed, before a final decision has been reached in the case.

Then, too, even if the contract of affreightment were

still in force, the master had no absolute right to have the cargo delivered to him upon stipulation. The language of Admiralty Rule 10 is that the court *may* order the *res* delivered upon a stipulation, and it is clearly left to the discretion of the court whether, in any case, such order shall be made or whether the order shall be for a sale.

The Nathaniel Hooper, 3 Sumn. 542, 562, 563.

Why, in this case, should this discretion have been exercised in favor of delivery of possession to the master upon stipulation? If his purpose in seeking possession was to complete the carriage of the cargo to its destination, and so to subject it to the payment of the chartered freight, it would be grossly inequitable and unjust to those interested in the cargo to have permitted him to do so. The interest of the owner in the cargo had, by the dangers of the seas, been rendered practically of no value. The master had left it derelict and, had it never been found or saved, would have been free from liability to the owner for abandoning it under the exception in the charter party of dangers of the seas and navigation. As the result of these dangers of the seas and navigation, the cargo, in the possession of the court, had become subjected to liens, which in any event, must practically exhaust the greater part of its value. There was first the lien of the salvors. According to all precedent, salvors of a cargo, derelict in the circumstances in which this one was, might be awarded fifty per cent of its value. They have been awarded forty-five. Half the cargo, therefore, had practically become the property of the salvors and had ceased to be the property of the owner. Then there was the lien for general average. To permit the owner, by the carriage of his property, after it had so become encum-

bered and after his interest in it had so been divested or emptied of its value, to become liable to a claim for chartered freight would be the height of injustice. Why should he be compelled to pay for the carriage of property, which had become practically the property of other people? It has, in fact, all been absorbed in satisfying the liens and none of it has come to those representing the original owner.

Here is abundant reason for the refusal of the court in its discretion to put the cargo in possession of the master for completion of the voyage, and for ordering a sale, but it is not all: in addition a part of the cargo had been jettisoned.

Andreasen, p. 27, ints. 43, 44.

It had all been damaged anywhere from ten per cent to forty per cent of its value according to the witnesses.

Darrach, p. 318, int. 25.
Roberts, pp. 296, 297 × ints. 69–78.

And it would have suffered further damage if carried on.

Darrach, p. 328, ints. 107–109.
p. 329, × ints. 110–113.

It was plainly inequitable, when the cargo had been thus emptied of value to its owner by its having become practically the property of others, for the court to order it to be delivered to the ship owner to be carried on, and thus to subject the owner of it to the payment of full freight for the benefit of other people. To quote the language of Mr. Justice Livingston in *Post* v. *Robertson*, 1 Johns, 24, there was no reason for adding to the other misfortunes of the cargo owner the payment of freight.

From every point of view the sale appears to have been a just and proper one, and it is to be noted, that the cargo owners, when they took no appeal from the decree of the District Court, abandoned all claim to any of the proceeds. They consented to retire with the loss of their whole cargo.

The ruling of the Circuit Court that Ward & Co. because they were not, according to that court's decision, entitled to treat the contract of affreightment as at an end, must answer for the consequences of the breaking up of the voyage by the sale of the cargo under the order of the District Court, and must pay freight to Montevideo, is erroneous on another and wholly distinct ground.

If the order of sale made by the District Court was not an order made in the exercise of its discretion for the best interests of all parties concerned, but was an order erroneously made in favor of the cargo owner upon an unfounded claim of right, to the injury both of the salvor and of the ship owner the obvious remedy of the salvor and of the ship owner was by writ of prohibition, and not by appeal from the final decree. No appeal was claimed at the time from this order of sale. The District Court would, of course, have stayed the execution of the order of sale in order to afford an opportunity for an application for a writ of prohibition. The Supreme Court was in session and application could have been made at once for a writ of prohibition. No such application was made or suggested and no stay of proceedings for the purpose of making one was asked for. The obvious remedy, therefore, not having been sought, the owners of cargo cannot now upon appeal be held to answer for the breaking up of the voyage by the sale.

If the abandonment at sea gave the cargo owner the right to treat the contract of affreightment as at an end, or if the sale by the court established the necessity of abandonment of the adventure, then the voyage was rightfully broken up in Boston, and no freight is due to the ship owner. Ward & Co. had good ground of appeal from the allowance by the District Court of *pro rata* freight, but they did not appeal. No freight is due when the voyage is defeated by a sale of the cargo from necessity at an intermediate port resulting from a common calamity.

The Nathaniel Hooper, 3 Sumn. 542.

8. THE JUDGMENT OF THE CIRCUIT COURT.

The learned Justice in the Circuit Court, Rec. p. 199, speaking of some of the decisions and text books, remarks that no late English authorities are found contravening the doctrine. He might have added that neither are any early English authorities found contravening it. He concedes that the decisions and text books make a great weight of authority, but held them to be subject to examination, because he regarded them as constituting only a modern declaration of how the rule ought to be laid down. Beginning, however, as they do, nearly a century ago, they are not all so wholly destitute of antiquity. Nor is the fact of great weight, if it be one, that no such principle is before the case of *The Kathleen* to be discovered in Maclachlan on Shipping or in Abbott on Shipping. Judge Ware seems to have thought in 1823 that the rule was to be legitimately inferred from the acknowledged principles of the marine law, and that the law was then so stated in Abbott on Shipping to which he refers. The American cases, which before *The Kathleen* had stated it, may

have been overlooked by the text writers, and no case may before that have arisen in England, the facts of which permitted the application of the principle. It is equally true that no statement of the contrary principle can be discovered in any adjudged case before or since the decision of *The Kathleen*, except the decision of the Circuit Court in the case at bar. The contrary principle, as established by that decision of the Circuit Court, appears to be this: that when a carrier by sea has abandoned performance of his contract of carriage by abandoning, under stress of an excepted peril, the possession of the goods entrusted to him for carriage, before bringing them to their destination, with no intention of returning or resuming it, and when the owner of the goods, while they are still out of the possession of the carrier, has signified his acceptance of the carrier's act, and his determination to treat the contract of carriage as abandoned, the carrier has, nevertheless the right to insist upon resuming performance of his contract, and to entitle himself thereby to his full freight, and the owner of the goods has no right to object to such resumption of performance unless upon condition of paying full freight. No trace of any such doctrine is anywhere to be found.

The learned Justice suggests that there is some doubt whether in *The Kathleen* the cargo was regarded as perishable. It was not a perishable cargo; it was cotton. An affidavit was made that it was deteriorating. This was analogous to the statement made in the motion as the ground for a sale of the cargo of *The Eliza Lines* in the District Court, Rec. p. 13, "that the value of said cargo is being rapidly diminished by reason of the charges of custody and other costs and expenses." Sir Robert Phillimore does not found his judgment in any way upon the fact that the cargo was perishable.

The learned Justice of the Circuit Court seems to find some difference in the principle as established by the decision in *The Kathleen* and by the decision in *The Cito*. Sir Robert Phillimore in *The Kathleen* is speaking of the case before him, in which the owner of cargo had appeared and signified his acceptance of the carrier's act and his intention to treat the contract of carriage as abandoned. In these circumstances the original contract was at an end as Sir Robert Phillimore says it was, and it was also true, as Sir Robert Phillimore says, that if the contract had not been thus ended the ship would have had a right to represent the cargo as well as the ship. He nowhere says, any more than the Lords Justices of appeal say in *The Cito*, that the abandonment of the contract by the carrier without more, at once, and without the assent of the cargo owner so far as he is concerned, dissolves the contract, although that statement is made both by Judge Ware and by Mr. Justice Livingston. Sir Robert Phillimore says also that the master at the time of abandonment had certainly lost all rights to freight, or to carry on the cargo, which is entirely consistent with the judgment in *The Cito*.

The owner of cargo has, of course, the right to contest the sufficiency of the peril to excuse the carrier's abandonment. He cannot be deprived of this right by the act of the carrier alone. When, however, he assents to the abandonment the contract is dissolved. If the abandonment is excused by an excepted peril, consent of the cargo owner to a revocation by the carrier of his renunciation, upon a subsequent change of circumstances, is implied when the owner of cargo does not signify his acceptance of the abandonment and renunciation and allows the carrier to resume possession.

The vessel is no more discharged from the cargo on

the theory of Sir Robert Phillimore than she is on the theory of the Circuit Court. The ship is discharged from the cargo by the abandonment on the intervention of the excepted peril, and when the property has got into the possession of the court on a libel for salvage by salvors, the owner of the cargo is without power to compel the carrier, against his will, to resume the carriage. The only difference is, that Sir Robert Phillimore and the other judges hold that the carrier has not the right to resume the carriage against the will of the cargo owner, while the Circuit Court holds that he has. This seems to be a greater injustice than any that is suggested by the Circuit Court as resulting from the principle supported by the English cases, for the principle of the Circuit Court leaves the carrier at liberty to resume or not as he chooses, while the cargo owner is without any option and can only conform to the carrier's choice. Both parties have contracted subject to an excepted peril. It would certainly seem that, when that peril has occurred so as to excuse one of the parties to the contract, it must equally excuse the other. The derelict floats upon the ocean. The carrier has abandoned his undertaking and is excused by the excepted peril. No one ought to deny that if the cargo owner should happen by he could take possession of his cargo and dispose of it as he might please, without incurring any obligation to the carrier. Upon what principle can the intervention of the salvor affect or vary the rights of either party except to subject the property to the payment of salvage? The cargo owner receives his property from the salvor, or from the court, exactly, so far as the carrier is concerned, as if he had fallen in with it and taken it floating on the ocean. He does not take it from the possession of the carrier, and incurs no obligation to him by paying or

securing the salvage, and receiving the possession from the salvor or from the court. If he incurs no obligation by receiving his property from the salvor or from the court, he of course incurs none by procuring an order of court for the sale of it.

The position of the parties is then, by the decision of the Circuit Court, reduced to this: If the carrier does not choose to stipulate, but permits his ship to be sold in the salvage proceedings, or if he is unable to give security and obtain her release, the owner of cargo has no remedy if the abandonment of the carriage, the original abandonment, was under stress of an excepted peril. Resumption was prevented by the sale of the ship under order of the court, which the carrier is under no obligation to avert. However much the owner of the goods may wish the carriage completed, if it is not for the interest of the carrier to resume performance, and performance is not resumed, there is thus no remedy. If, however, it is for the interest of the carrier that the carriage shall be resumed, he may offer to stipulate and resume performance, and the owner of the goods must pay full freight either for completion of the carriage or for refusing to allow its completion, and pay heavy salvage besides.

Illustrate this from the case at bar. Suppose the salvors had been a few days longer in reaching Boston with the Eliza Lines, and that Captain Andreasen had sailed from St. John for Norway before the bark had been brought into Boston, is there any reason for supposing that the owners of the bark would have made any offer to resume the carriage of the cargo to Montevideo? And suppose they had not. Suppose they had left the salvage proceedings to take their course, their ship to be sold, (her whole value when she arrived in Boston was only $2250, Rec. pp. 65, 207, and the cost

of repairing her was upwards of $6600, Rec. p. 253), the proceeds applied to payment of the ship's salvage, and the balance to them, there would have been no breach of the contract of affreightment, for which the cargo owner would have had any remedy, no matter how great his desire might have been that his cargo should be carried to its original destination, or how great a loss it might have been to him that it should not be so carried.

It is not perceived that the rule adopted in the Circuit Court affords a remedy for any of the evils pointed out in the opinion. The general rule mentioned that, where the master can repair in a foreign port without unreasonable delay or disproportionate expenditure, it is his duty to do it and carry on the cargo, *applies only in cases where the master has retained possession of his ship and cargo.* It does not apply, as above pointed out, when he has parted with the possession of them under stress of an excepted peril, and can regain them only by stipulating to a libel for salvage. But, even according to that rule, if it did apply, the owners of the Eliza Lines would have been under no obligation to repair their ship by the test laid down in the case cited by the learned Justice of *The Assicurazioni Generali* v. *S.S. Bessie Morris Co.* L. R. (1892) 2 Q. B. D. 652, of what is so clearly unreasonable as to be impossible in a business point of view, because, as already mentioned, the cost of repairing the Eliza Lines far exceeded her value.

It is suggested by the learned Justice in the Circuit Court, that the rule of *The Kathleen* might work great injustice in the case at bar, and certainly would in the supposed case of a long voyage nearly completed and the vessel brought by salvors into the port of destination, or into a neighboring port quite as desirable for

the cargo owners, with the cargo intact and a valuable freight lost to the ship and saved to the cargo, without any equivalent or consideration therefor. Cases are quite as likely to arise, however, like *The Arno* and *The Argonaut*, where the greater part of the carriage is performed by the salvor, and, besides, the cargo owner has in any event the burden of the very large salvage, which is usually awarded in cases of derelict, and when he pays that he pays for the conveyance of his cargo a good deal more than the ordinary freight. No illustration is needed of hardship greater than in the case at bar under the rule applied in the Circuit Court. By the result reached the owners of cargo have to submit not only to the loss of their entire cargo, but to pay an additional sum of $5281.30. This, too, is a loss against which the owner of cargo can hardly protect himself by insurance, while the loss of freight is one against which the ship owner can easily and ordinarily does fully protect himself by insurance. If insured, he is protected against it in the case at bar.

It is said by the learned Justice in the Circuit Court that it was held in the case of *The Leptir*, that the rule would not apply where the abandonment was improper, and that had this been a decision of the Court of Appeal. it would have brought the rule, as laid down in England, to the absurdly unjust conclusion that the meritorious master who succumbs to the inevitable results of a maritime disaster must lose his freight, while the unmeritorious master may secure it.

It must not be forgotten that Mr. Justice Butt, who decided *The Leptir*, was counsel on the losing side in the case of *The Cito*, and was no doubt touched with the feeling towards that decision, which counsel are apt to indulge in with regard to cases, in which the court has differed from them. But it is submitted with all re-

spect to the learned Justice of the Circuit Court that his criticism of the decision in *The Leptir* is not well founded. Mr. Justice Butt begins the judgment in the case by saying, "I am very clearly of opinion in this case that on the facts there was no abandonment of this ship within the proper meaning of the word, and therefore the case of *The Cito* does not apply." He then goes on to state what he should be strongly inclined to say if there had been an abandonment, which is, that the abandonment would have been so improper, that the cargo owners would have been entitled to recover damages against the ship owner for the wrongful act of the crew, "which assumes, therefore, that the contract of affreightment was not thereby put an end to." He then proceeds, "That being so, it follows that some freight is due." The meaning of this plainly is, that his conclusion follows from the finding that there had been no abandonment, and not from something that he would have said if there had been the occasion for saying it, which he finds there was not. The action was by seamen for wages, and not by the owner for freight. Mr. Justice Butt would hardly have held, even in an action by seamen for wages, that the owners of a ship, which had been wrongfully abandoned and left derelict by her master and crew, were entitled to any freight. He certainly would not have so held in an action for freight. It is clear, too, that if the owners of cargo abandoned by a master and crew, desired to treat the contract as at an end, and if it were essential to the exercise of this right, that the abandonment should have been in consequence of an excepted peril, the owners of the ship would be estopped to deny that the abandonment of her by the master and crew was justifiable and to assert that it was wrongful. In the case of *The James Martin*, 88 Fed. Rep. 649, where

the abandonment had been wrongful and the vessel and cargo had been brought to her port of original destination, Judge Hughes held not only that no freight was due, but that the owners of the ship were liable for the money paid for the salvage and damages to the cargo.

The rule established by the American and English decisions above cited, does not make the right to freight depend in any way on the convenience or the caprice of the salvors, as suggested by the learned Justice in the Circuit Court, in determining whether they shall bring the vessel into the port of destination or into some other port. The case of *The Arno* was decided in 1895, after the decision of the learned Justice of the Circuit Court in the case at bar, which was in 1894. The general rule is that the salvor must carry his salvage to the nearest port of safety, but wherever he may carry her, we have seen that the cases in both countries hold, that there is no right to freight when the cargo of a derelict is brought by the salvor to its port of original destination.

The learned Justice of the Circuit Court concedes that the judgment of Judge Ware in *The Elizabeth and Jane* is of great merit, and that it lays down in general terms, but quite positively, the same rule as that given in *The Kathleen*. But he says that it was on the proposition of the right of mariners to wages as against salvage, when there was no correct delivery of the cargo, that the attention of the learned judge was fixed, and that "therefore the precise question in the case at bar was not brought to the attention of the court, and we are unable to say how far the learned judge intended to discriminate between cases where the voyage was broken up by derelict, or by wreck under other circumstances." But the question whether freight was due was the very question that had to be

determined in order to settle whether the mariners were entitled to wages.

Judge Ware would have said that it was not of the least consequence whether any effort or attempt was made by the ship owner to earn freight if, in his view, the owner could have established any right to earn it. As between the owner and his seamen, if the owner had a right to earn freight he was bound to earn it, and must be deemed to have done all that was necessary to entitle himself to it. The owner could not answer to his seamen that there was no freight because he chose not to earn it. The case that the learned judge was dealing with was a case of derelict, and it was as to a case of derelict that he stated the law. Whether any discrimination was applicable to a case of wreck under other circumstances would be for his determination when a case of wreck under other circumstances should come before him.

THE NATHANIEL HOOPER, 3 Sumn. 542.

The learned Justice of the Circuit Court felt that, by the decision in this case he was justified, or even concluded, to decide against the express decision of Judge Ware in *The Elizabeth and Jane*, and against all the other express authorities in the premises. While admitting that *The Nathaniel Hooper* cannot be relied on as authoritatively determining the law against them, "because the result of it was that under the circumstances the court held no freight was earned," he found it, nevertheless, to be an implied authority to the contrary from the circumstance, that the principle contended for is not mentioned in it, and from some of its expressions and general line of reasoning.

We submit with great deference that no such inference can be fairly drawn from the decision in that case.

We note in the first place that *The Nathaniel Hooper* is cited with approval and quoted from by Sir Robert Phillimore in his judgment in *The Kathleen* at page 276. It is clear that Sir Robert Phillimore found nothing in the case at variance with what he stated in *The Kathleen* to be the law. Then, too, it is to be presumed that the decision of Judge Ware in *The Elizabeth and Jane*, and the decisions of the Supreme Court of New York in the cases above cited, were known to Mr. Justice Story. His opinions show that he is familiar with Johnson's reports and often cites from them. The eminent counsel in the case could hardly have been ignorant of these decisions, or have left them unknown to the Judge, if he were not already informed of them. If Mr. Justice Story was, as he must therefore be presumed to have been, aware of these decisions, and if any of the principles declared in them were regarded by him as inconsistent with what he was declaring to be the law in *The Nathaniel Hooper*, it is entirely inconsistent with his usual practice and habits of judicial exposition, that he should not have commented upon and criticised them. If he found nothing inconsistent in the judgment that he was delivering with the able exposition of the law by Judge Ware in *The Elizabeth and Jane*, including the statement that by shipwreck with abandonment by the crew the contract of affreightment is totally dissolved, and nothing to criticise in Chief Justice Kent's decision in *Dunnett* v. *Tomhagen*, where part of the cargo was brought to its port of original destination by the salvor, that no freight was earned because no part of the cargo was delivered by the ship, it is not at all likely that he would have seen any occasion to discuss or to criticise the decisions in *The Kathleen* and *The Cito*, if they had been before him, or to differ from them.

The truth is that in *The Nathaniel Hooper* there was nothing in the facts, to which the principle was applicable that is contended for, that the abandonment by the carrier of the possession of the goods and of his contract of affreightment gives the right to the cargo owner, before the possession of the goods has been restored to the carrier, and while they are still in the possession of the court on a libel by the salvors, to treat the contract of affreightment as at an end. The owners of the cargo of *The Nathaniel Hooper* were not in Boston when the derelict was brought here and libelled for salvage, and had no agents here. They never signified any acceptance of the carrier's act of abandonment, or any determination to treat the contract of carriage as abandoned. Indeed, when the owners of two-thirds of the cargo did afterwards authorize agents in Boston to act for them, those agents addressed a letter to one of the part owners of the ship, asking him to decide either to send the cargo forward to its destination or not, to which he replied declining to have any thing farther done on his part in the business, and Mr. Justice Story said he was not in fault. For the reasons hereinbefore pointed out, the cargo owner had no means of compelling him to have anything farther done on his part. The insurance companies, to whom the remaining one-third of the cargo had been abandoned, after acceptance of the abandonment, applied to the court for delivery to them of this one-third upon stipulation which was granted, no objection being made thereto by any of the parties, but this was after the ship owner had obtained his ship upon stipulation and sold her.

9. THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS.

The learned Judge, who delivered the judgment of

the Circuit Court of Appeals, seems to found his judgment and much of his reasoning upon the postulate, that the abandonment at sea by the master and crew was involuntary.

After some general observations on the case he begins his judgment on page 406, "The substantive rights of the various parties are principally involved in the question whether the involuntary abandonment of the vessel at sea, under the circumstances pointed out, operated to terminate the contract of affreightment," and he repeats the phrase "involuntary abandonment," lower down on the same page, and again on pages 407, 409, 410 and elsewhere. On page 407 he begins the paragraph below the middle of the page, "It is apparent that the abandonment of the vessel was not voluntary."

This postulate, with all respect, is wholly incorrect. The master and crew were not swept from their ship by the waves; nor did they, like Palinurus of old, fall overboard in their sleep. They signalled to a passing vessel and left their bark voluntarily upon Andreasen's request to be taken aboard the other vessel, Rec. p. 26, int. 31. There is no contradiction or qualification to be found in the record of this evidence. That they left under stress of peril of the sea, and in the honest belief that they could no further prosecute their voyage in the bark, does not make the abandonment involuntary in law or in fact, or in any correct use of language. Their acts in cutting away the masts and in jettisoning part of their deck cargo were acts done under stress of peril of the seas, but they were none the less voluntary acts. The act of abandonment was no less voluntary than the act of cutting away the masts. If the act of cutting away the masts, because it was done under stress of peril of the seas, was therefore not voluntary,

what becomes of the claim for general average? General average is founded on voluntary sacrifice by the master under stress of peril, and does not exist without voluntary sacrifice. If acts, because done under stress of peril, are therefore involuntary, general average ceases to exist.

Nor is it strictly correct to say, as is said by the learned Judge in the passage quoted, that the question is whether the abandonment of the vessel operated to terminate the contract of affreightment. It was not contended, as already pointed out, that the carrier by his own act alone could terminate the contract of affreightment. The contention was and is, that the abandonment of bark and cargo by the master, the agent of the ship owner, was an abandonment and renunciation by the ship owner of his contract of affreightment so far as he alone can do it, which gave the right to the owner of cargo, at any time before the ship owner or his agent had regained possession of the cargo, to treat the contract of affreightment as abandoned and at an end, and thus to terminate it by the joint act of both parties.

Again on page 407, the learned Judge says, "It is not altogether clear that the English authorities establish the proposition that the owners of a cargo may, under an involuntary abandonment at sea like the one in question, and in the absence of an actual intention on the part of the ship owner to abandon the vessel, treat the contract of affreightment as absolutely at an end."

In every one of these authorities the abandonment at sea was under stress of the excepted peril, and in every one of them the abandonment was involuntary, if the abandonment of the Eliza Lines by Captain

Andreasen and his crew may be correctly termed involuntary.

The meaning of the phrase "in the absence of an actual intention on the part of the ship owner to abandon the vessel" is not altogether clear. If it is meant that the personal intention of the ship owner himself to abandon, as well as the intention of the master as agent in charge to abandon, is necessary, the statement is incorrect. The ship owner himself is not present. He is there in the person of his master, his agent, having full charge and authority from him. In none of the English cases is there any evidence of any personal intention on the part of the ship owner, aside from the intention of his agent, the master, with the act of master and crew. They are all based on the intention of his agent, the master, as his intention binding him, and the cases do clearly establish the proposition, that the abandonment by the master and crew, without intention of returning, under stress of an excepted peril, does give the owners of the cargo the right to treat the contract of affreightment as abandoned and at an end. The abandonment of the vessel and cargo without intention of returning establishes the abandonment by the owner, so far as he can, of the contract of affreightment.

The Arno, 8 Asp. Mar. Law Cas. 5.

Captain Andreasen testified, Rec. p. 30, × int. 85, that when he left his vessel he could not say that he expected to see her again.

Unless abandonment of ship and cargo, without intention of returning, and without expectation of ever seeing them again, is abandonment at the same time of the contract of affreightment, then abandonment of the contract of affreightment could never be proved.

Even if the master should write to the owners of cargo that he with his crew had abandoned ship and cargo on the ocean under stress of an excepted peril, leaving them derelict on the ocean, he would not be likely to add that he had also abandoned his contract of affreightment. It would be superfluous. No master upon abandoning his ship and cargo would be likely to declare in terms that he abandoned also his contract of affreightment. No master would be likely to post a notice on his abandoned ship that in abandoning her he abandoned also his contract of affreightment.

On the same page the learned Judge, after stating it to be apparent that the abandonment of the vessel was not voluntary, adds that it is apparent "that there was no actual renunciation of the contract by the ship owners, neither was there in that respect any actual intention one way or the other involved in the abandonment."

Here again, if the learned Judge means that actual renunciation by the ship owner personally is necessary, it is clearly incorrect. The renunciation by the master, his agent, in full charge is sufficient. (*The Arno*, 8 Asp. Mar. Law Cas. 5). The actual renunciation is involved in the act done by the master and crew. Positive intention to renounce follows necessarily from abandonment with no intention of coming back. When there is no intention to return it inevitably follows that there is no intention to further perform the contract of affreightment.

The whole suggestion of the learned Judge as regards intention is fallacious. Abandonment on the ocean of ship and cargo with no intention of returning is so wholly inconsistent with any intention to further perform the contract of affreightment, that it necessarily includes the intention to abandon and renounce that

contract, whether that intention is actually present at the moment in consciousness or not.

If Mr. Ward had met Captain Andreasen when he landed at Port Maitland and asked him if he intended to complete the carriage of his cargo to Montevideo, Captain Andreasen must have answered, "Why, how can I? The masts of my ship were gone, she was helpless and unmanageable, and we had to leave her to save our lives. She is drifting round somewhere on the Atlantic Ocean, and I don't know where."

Again, the learned Judge says on the same page, "It is probably true that when, under stress of weather and circumstances, the master and crew were taken from her deck, they acted upon the idea that she was lost, but there was no wrongful intention" &c. He should have said "undoubtedly true" but in the phrase "the master and crew were taken from her deck" is the suggestion of the same fallacy of absence of volition which is expressed in the repeated phrase "involuntary abandonment." The master and crew were not "taken from the deck" of the Eliza Lines. They voluntarily left it to go on board of a vessel which they had signalled to their assistance.

Nobody ever contended that there was a wrongful intention. If there had been a wrongful intention and the abandonment had been without justification from the excepted peril, not only would the ship owner have been without any right to insist upon resuming performance of the contract of affreightment, but he would have been liable to the owners of the cargo for the expenses of salvage and for all other expenses which might have resulted, and if the cargo had been lost would have been liable to Ward & Co. for its whole value.

The Leptir, 5 Asp. Mar. Law Cas. 411.
The James Martin, 88 Fed. Rep. 649.

On the same page 407 the learned Judge says, "under such circumstances the vessel was picked up by others and without any substantial change in her condition or that of her cargo was brought into the port of Boston." But there had been a very substantial change in the condition of her cargo. By the act of abandonment the cargo had been left derelict and was brought into the port of Boston subject to the large expenses of salvage consequent upon that situation. In none of the American or English cases cited is any change in condition of vessel or cargo mentioned, nor is any such change made a ground of decision.

The learned Judge says on page 408, "The ship owner in no sense, from the beginning of the voyage from Pensacola to the time he asserted the right of repossession at Boston, had renounced the contract between himself and the cargo owners. He had not agreed that the contract should be treated as off." It is true that the owner had not personally in express terms renounced it, but his agent, placed by him in possession of the ship and cargo with full authority, had unequivocally given up the further performance of the contract under circumstances which excused him, and so in behalf of his owner had renounced it and agreed that it should be treated as off.

On the same page 408, the learned Judge says: "In *The Arno*, as well as in the American case *The Elizabeth and Jane* (15 Fed. Cas. 478) the ship owner had made no effort, nor shown any intention to reclaim the property, at the time the cargo owners interposed."

In *The Elizabeth and Jane*, the report shows that the owner of the ship was the owner also of the goods. There was no separate owner of the goods to interpose. The case was an action by seamen for their wages, which were refused by Judge Ware because no freight had been earned. As already pointed out, Judge Ware would have been quick to say that, if there were a right and opportunity to earn freight, the neglect of the ship owner to exercise the right could be no answer to a claim for wages.

So far from its being true that, in the case of *The Arno*, the ship owner had made no effort nor shown any intention to reclaim the property at the time the cargo owners interposed, no case can be found in which such determined effort to that end had been made by the ship owner. The following facts appear in the report of the case, 8 Asp. Mar. Law Cas. 5; and in 72 L. T. (N. S.) 621.

The Arno was on a voyage from New York to Liverpool. She was abandoned at sea on March 31, 1895, with her cargo. She was found and saved by the Steamship Merrimac. On April 11, the owner of the Arno, having heard of the abandonment and that the ship had been fallen in with by the Merrimac, obtained an undertaking from the owners of the Merrimac, by which they agreed, on security being given for the salvage claim, to hold the Arno on her arrival in any port in the United Kingdom for her owner. The owner of the Arno also sent a tug to meet her. The tug fell in with her in the English Channel, put a master on board appointed by the owner of the Arno and assisted to bring her to Liverpool, her port of destination. April 18, solicitors for the owners of cargo gave notice in writing to solicitors for owners of the Arno, that the owners of cargo regarded the contract

of affreightment as at an end. April 25, the Arno arrived in Liverpool and the salvors formally made over possession of the vessel and cargo to the agent of the owner of the Arno. Mr. Justice Bruce finds in his judgment that the owners of the ship, ever since they heard she was in the hands of the salvors, (and this as appears above was a week before the notice given by solicitors for the owners of cargo), had done all they could to assert their claim to carry out the contract so far as possible, and to demand freight.

The learned Judge, on page 409, quotes from the decision in *The Cito* this passage: "We do not decide what would have been the result if, after the ship had been brought in as it was by the salvors, and before the cargo owners had come and exercised their right to the cargo, the ship owner had given bail for the ship and the cargo and had carried the cargo on," and proceeds, "That at least amounts to a query as to the application of the doctrine of *The Kathleen* to a case like the one at bar." But in the case at bar, the ship owner had not given bail for the ship and the cargo and carried the cargo on before the cargo owners had come and exercised their right to the cargo. Ward & Co. in the case at bar had exercised their right before the libel for salvage was filed by demanding the cargo from the salvors and forbidding them to deliver it to the ship owner. When the libel was filed, they had further exercised their right to the cargo in identically the same manner, in which the right was exercised by the cargo owner in the case of *The Kathleen;* that is, by an application to the court for the delivery to them of the cargo upon their stipulatiou for salvage, without payment of freight. In this respect the case at bar is on all fours with the case of *The Kathleen.* The pas-

sage quoted from the decision of *The Cito* amounts therefore to no such query.

The learned Judge further says, page 409, "In *The Leptir* (5 Asp. Mar. Cas. 411) the doctrine of *The Cito* was questioned by the court, for it is there said at page 412, 'I do not intend to carry *The Cito* a step farther than it has gone' and, under the circumstances of that case, the owner of the cargo was held liable for the freight."

The Leptir was not an action for freight, but an action for seamen's wages, payment of which was resisted on the ground that freight had not been earned. The facts which Mr. Justice Butt found, as appears in the report of the case, and therefore "the circumstances" under which the owner of cargo was held by him liable for the freight were, *that there had been no abandonment at sea by the master and crew of ship and cargo.* To apply to a case, in which there had been no such abandonment, the decision in *The Cito*, which is founded wholly on such abandonment, would have been to carry *The Cito* not merely one step farther but to carry it across a chasm. If by the remark quoted Mr. Justice Butt meant to question or to criticise the decision of *The Cito*, it is fair to say that he is not an impartial critic for the reason that, in the case of *The Cito*, he was the unsuccessful counsel for the ship owner.

We find the learned Judge, near the foot of page 409, assuming that the necessity for what he calls the harsh rule of the English authorities in respect to derelict property on the ocean has ceased to exist, and declaring that "the spirit of modern law and present conditions of civilization will justify a closer approximation to a rule of justice."

On the other hand, the learned Justice of the Circuit Court, Rec. p. 199, begins his discussion of these same English authorities by pointing out that the rule they lay down had not found its way into Maclachlan on Shipping or Abbott on Shipping before the year 1873, and declaring that they are subject to examination in the Federal Courts, because they constitute only a modern declaration how the rule ought to be laid down.

There is no justice in the assertion of the law and Judge of the Court of Appeals on page 409, that the rule of *The Kathleen* and of *The Cito* permits the cargo owner to take advantage of the misfortune of the ship owner. The rule is simply, that when there is common misfortune, and when one of the parties takes advantage of the mutually excepted peril to abandon, without thereby becoming liable for a breach, the further performance of the contract, and by parting with possession has put it out of his power further to perform, the other party shall, likewise, be excused by the same mutually excepted peril if he too abandons performance while the first party remains out of possession and so without the power to resume. It is just as fair to say that Captain Andronsen took advantage of the common misfortune to abandon Ward & Co.'s property and leave it derelict at sea to be subjected, if not finally and forever lost, to heavy claims for salvage.

And why should the rule be stigmatized as a harsh rule? There is nothing in it more harsh than there is in the rule, which adds to the misfortunes of the owner of abandoned and derelict cargo, whose goods have, without fault of his, become, through a common misfortune, encumbered by liens which exhaust or nearly exhaust their value, and who has not taken his goods out of the hands of the carrier, the further misfortune

of an obligation to pay a large freight for the carriage of his goods thus encumbered to their original destination, for the benefit wholly of others.

IV.

ERRORS SPECIFIED IN THE CROSS PETITION FOR CERTIORARI OF THE SALVORS, BOTTOMRY CREDITOR AND MASTER.

The errors specified in the cross petition are:

1. That the court awarded only net freight instead of gross freight, and deducted from it the net freight, earned by the Eliza Lines by making another voyage within the time, which it would have taken her to reach Montevideo and earn her freight if the original voyage had been resumed and completed.

2. That the court did not require Ward & Co. to pay into court sufficient of the true value of the cargo to satisfy the claims for salvage, freight and general average with interest, also the full amount of the gross freight money with interest, or to give stipulations therefor.

NET FREIGHT OR GROSS FREIGHT.

1. The claim for gross freight as against net freight is founded upon decisions, which declare that the master is not bound to give up the cargo at an intermediate port without receiving full freight on it, or that the owner of cargo cannot take his cargo from the master or from the ship at an intermediate port without paying full freight on it, or similar expressions.

These expressions are found in actions against insurers for loss of freight, like *Jordan* v. *Warren Ins Co.* 1 Story, 342, *McGaw* v. *The Ocean Ins. Co.* 23 Pick. 405, and others, where, as pointed out by the learned Justice of the Circuit Court (Rec. p. 357), the court is speaking of full freight as distinguished from freight

pro rata, and there has been no occasion to discuss the method of determining what is full freight. *Luke* v. *Lyde*, 2 Burr. 882, S. C. 1 W. Black. 190, was a case of capture and recapture and in that case *pro rata* freight was allowed. The decision in that case has been doubted and discredited in the English courts and in many American decisions. Similar expressions occur in *Tindal* v. *Taylor*, 4 E. & B. 219. In *Tindal* v. *Taylor* however, the vessel performed the whole voyage and delivered her cargo at the port of destination. They are also to be found in other cases like *Hart* v. *Shaw*, 1 Cliff. 358; *Clarke* v. *Crabtree*, 2 Curtis, 87; *Bradstreet* v. *Baldwin*, 11 Mass. 229; in all of which the vessel performed the whole voyage and delivered her cargo at the port of destination, but through the fault of the charterer was not provided with a full cargo or was prevented from making delivery at the port of destination after arriving there.

In this case, however, the master did not give up the cargo to the shipper nor did the shipper take it from the ship or from the master's possession, for the reason that the master was not in possession of it. It was through no fault of the charterer that he had lost possession. The alleged wrong, for which Ward & Co. in the Circuit Court were condemned in damages, was wrongfully preventing the master from regaining possession by obtaining the sale of the cargo by order of the District Court. This was more analogous to a failure or refusal of a charterer to supply a cargo. It is well settled that in an action against the charterer of a ship for not loading a cargo, the measure of damage is the amount of freight which would have been earned after deducting the expenses and also any profit which the ship may have earned during the period over which the charter extended.

Watts v. *Camors*, 115 U. S. 353.
The Gazelle and Cargo, 128 U. S. 474.
Dalbeattie S. S. Co. v. *Card*, 59 Fed. Rep. 159.
Leblond v. *McNear*, 104 Fed. Rep. 826.
Smith v. *McGuire*, 3 Hurlst. & N. 554.

This gives full indemnity for the wrong and is in accordance with the general rule of damages in case of breach of contract. It gives what the party has lost.

Warren v. *Stoddart*, 105 U. S. 224.

There is no reason in principle or authority for condemning Ward & Co. to pay a profit, by making them pay for expenses which were never incurred and for the use of the bark while she was profitably employed in the service of some one else.

The learned Judge of the Circuit Court of Appeals for the reason, it is supposed, that in his view the breaking up of the voyage resulted from the order of the District Court on the motion of Ward & Co. found the case in respect to damages (Rec. p. 413) to be analogous in principle to *The Bank of the United States* v. *The Bank of Washington*, 6 Pet. 8; *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216.

It has been contended that in allowing only net freight the Circuit Court deprived the ship owner, not only of his estimated expenses from Boston to Montevideo, but also of his actually incurred expenses in Pensacola and from Pensacola to Boston. This contention is clearly unfounded. The record shows, p. 208, that all that the court directs the commissioner to deduct from the gross freight were, such actual and theoretical charges as would be necessary to ascertain the net freight in case the cargo had been reladen and

the voyage completed ; that is, only such charges as were saved to the vessel, (Rec. p. 357). If any error was made by the commissioner in carrying out these instructions no exception was ever taken to it and it is not now open.

So far as the value of what is saved enters into the determination of the amount of the salvage award, the compensation of the salvor, in this case, certainly ought not to be based upon saving gross freight, for he clearly had not saved gross freight when he brought the Eliza Lines into Boston.

Perriam v. *Pacific Coast Co.* 133 Fed. Rep. 140.

VALUE OF THE CARGO.

2. The claim that Ward & Co. should be required to pay into court the true value of the cargo seems to be founded upon the contention, that the sale at auction under order of the court did not establish the true value of the cargo at Boston, or else that Ward & Co. are to be charged in Boston with the value of their cargo somewhere else. Neither of these contentions can be maintained.

The due appraisement, which by Admiralty Rule 10 is made the foundation of giving a stipulation or depositing money in court, is always an appraisement of the value of the property where it is when the appraisement is made. It is never an appraisement of its value elsewhere. If the appraisement were to be of what its value might be in some other place, there is no rule to settle what other place shall be taken. So far as the value of the property enters into the determination of the salvage award, it is the value of the property at the place to which the salvor has brought it. The appraisers may take into consideration any value which the property may have at the place where it is, to be

carried to some other place, and value to be carried to other places enters also into the consideration of buyers if the cargo be sold, so that whether the value be determined by appraisement or by sale, an element in determining it is value to be carried elsewhere.

In the absence of fraud, which is not alleged, the price obtained at a public sale is the best evidence upon familiar principles of the true value of the cargo at Boston.

It is indeed asserted, that the cargo was unsuited for the Boston market and brought a low price because Boston was a disadvantageous place in which to sell it; but Gjert Lootz, the Norwegian Consul, called as a witness for the ship owner and always a swift witness for him whenever he got a chance to be so, testified that while the sizes were not very well suited for the Boston market, the reason why the cargo did not bring more at auction was not that fact but because there was a very heavy fire in progress in the city at the time, in consequence of which there were only two or three bidders present at the auction sale.

Lootz, p. 95, × ints. 53, 54, 55.

Madden testified, Rec. p. 103, int. 22, p. 107, × ints. 58–62, that such a cargo would be worth a trifle more at Pensacola than at Boston, and that the cost of shipping it from Boston to South America would be from fifty cents to a dollar more per thousand than from Pensacola. There were of course plenty of lumber dealers in Boston and lumber dealers dealing with markets all over the world, and a cargo would be bought in Boston just as readily to be shipped to Montevideo, if not suited for sale in Boston, as it would be bought in Pensacola to be shipped to Montevideo. To say that it was unsuited for the Boston market is to

assume that it would be bought only for use or resale in Boston, which is manifestly incorrect. The cost price in Pensacola was $3460.77.

Rec. p. 338.

There was reason enough in what the cargo was known to have gone through to prevent it from bringing a high price, whether for use in Boston or for export to another market. It had been abandoned and left derelict at sea; the vessel in which it was laden after floating around some time arrived in Boston with twelve or fourteen feet of water in her hold.

Hughes, pp. 54, 55, 61, ints. 28, 29, 31, × int. 105.

Whidden, pp. 65, 66, ints. 1, 4.

Until the water was pumped out and the cargo discharged, the cargo was soaking in this salt water. Then, again, when discharged it was thrown out in bulk and not sorted, was much damaged in this way, and was sold in this condition.

Madden, p. 108 × int. 77.

For the manner of its discharge and the condition in which it was sold Ward & Co. cannot be held responsible for they had nothing to do with it.

The cargo, until it was sold, was in the custody of the marshal, but the record does not show under whose immediate direction it was unladen from the bark. The bark was delivered to the master on stipulation October 5, 1889. Rec. p. 12. The cargo had all been unladen before the hearing in the District Court October 18, 1889, on the motion of Ward & Co. for a sale, as appears by the evidence of West, Rec. p. 76 at foot, although Lootz testifies that it was not unladen until

after the order of sale made November 16, 1889, by the District Court, which is plainly untrue.

Lootz, p. 340, × ints. 10, 11, 12, 13.

L. S. DABNEY,
F. CUNNINGHAM,
of Counsel.

APPENDIX.

THE ARGONAUT.

This was an appeal from a judgment of the President of the Probate Divorce and Admiralty Division on a special case arising out of a claim for salvage brought by the steamship Widdrington for services rendered to the derelict bark Argonaut, which was on a voyage from Halifax on the 22d February, 1883, off the English coast. The question before the court on the special case was whether the owners of the ship and freight were entitled to payment to them of freight in respect of the carriage of the cargo from Halifax from the Western Insurance Company, the owners of the cargo; whether the Admiralty Court having directed the marshal to remove the cargo on board the Argonaut from Plymouth where she was taken by the salvors to Liverpool, her original port of destination, freight was due in respect of the carriage of the cargo, and whether the expenses of the carriage from Plymouth to Liverpool should not be repaid by the Western Insurance Company, the owners of the cargo, to the owners of the vessel Argonaut. The President found by his judgment that no freight was due in respect of the carriage of the cargo from Halifax to Plymouth, but that the expenses of carriage from Plymouth to Liverpool and of the delivery of the cargo at Liverpool should be paid by the owners of the cargo to the owners of the ship.

Mr. A. Cohen, Q. C. M. P. with Mr. Bucknill ap-

peared for the appellants. Dr. Phillimore, Q. C. with Dr. Stubbs for the respondents.

The Master of the Rolls, in giving judgment, said, 'I am very sorry to differ from the President of the Admiralty Court in this case, but I do. It seems to me that he has been alarmed at the result, not unnaturally, that the cargo owner here, according to the facts found, by reason of the carriage of this cargo of timber to Liverpool has got a much higher price for it than he would have got for it had it remained at Plymouth. Alarmed at that, the President has inferred consent and inferred obligation, which, with great deference, I cannot think he ought to have inferred. The facts of the case are that the cargo is shipped at Halifax, in a bill of lading contract, to carry that cargo to Liverpool. It is a timber cargo, the least perishable of all cargoes. The ship on her voyage from Halifax to Liverpool meets with such weather, that the statement in the case is, that the captain and crew were justified in abandoning her, and did ; she was a derelict on the ocean for many days ; salvors fell in with her and took her, not to Liverpool, but to an intermediate port, Plymouth, where she was in their hands. Under these circumstances the owner of the cargo applied to have his cargo delivered to him at Plymouth, and stated that he was willing to give bail to the court of Admiralty for the salvage amount for which his cargo would be liable. The court would never insist on the cargo owner giving bail to the whole value of ship, freight and cargo, having the other people before it who would have to give security if necessary. It seems to be clear that the cargo owner under these circumstances, had a right to the possession of his cargo. The possession of the cargo up to that moment had never gone back to the ship owners

at all. Neither had the possession of the ship. The ship was in the hands, first, of the salvors, then of the Receiver of Wreck, then of the Court of Admiralty; and the cargo owner, finding her in this position at an intermediate port, says, "I demand that my cargo should be given up to me, and I ask for the order of the court.' I cannot conceive how this case can be said to differ from the cases of the Kathleen and the Cito, which have been referred to, and while the case remains in this court, I consider we are bound by those decisions, founded as they are upon perfect principles of law. The owner, therefore, was desirous to have his cargo at Plymouth, but the court refused to make an order, and said — 'We will not make an order to that effect, we shall order that this cargo be carried on to Liverpool.' Well, there is no appeal against that order, and therefore we are not at liberty to say that that order was wrong. What we should have done if it had been appealed against, I will not undertake to say. The court orders the cargo to be carried to Liverpool, by the marshal of the court; the crew of the owners of the ship being still on board, the cargo is taken to Liverpool, and then there is an order of court to deliver it up to the cargo owner, upon his application, but the court couples that with saying, 'We would infer from the fact that you did not apply, and from the fact that you did not bring your case clearly before the Judge of the Admiralty Court at Plymouth that you consented that your cargo should be taken to Liverpool, and upon the terms that you should pay a *quantum meruit* amount on the cargo.' This case I think comes within the decision which was made the other day, in point of principle, that if against a man's will you do something which is for his benefit, then there is no inference of law that he is bound to pay for

what you have thus been good enough to do for his benefit. If you do a benefit for a man knowing that he can either decline or accept it, then if he accepts it you may infer that he accepts it upon the terms of paying for it, but if he has no choice you ought not to infer anything. It seems to me, with deference, that the learned Judge ought not to have drawn the inference he did as to the liability of the owner of the cargo, and I think that this appeal must be allowed.

Lord Justice Lindley concurring, the appeal was affirmed, with costs against ship and freight.

Shipping Gazette, Weekly-Summary, Dec. 5, 1884, p. 775. Salvage— The Argonaut. (Before the Master of the Rolls and Lord Justice Lindley, Dec. 3.)

12.
Sup. Ct.
1909

FILED
MAY 29 1909
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1908.

THE ELIZA LINES, HER CARGO AND FREIGHT

vs.

THE PETITION OF

CATHARINE T. BLACK, ADMINISTRATRIX,
BANQUE DE GÊNES,
HANS ANDREASEN.

For a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

FOR THE PETITIONERS.

FREDERIC DODGE,
EDWARD C. DODGE,
JOHN LOWELL,
JAMES A. LOWELL.

Supreme Court of the United States.

OCTOBER TERM, 1903

IN ADMIRALTY

No.

THE ELIZA LINES, HER CARGO AND FREIGHT

THE PETITION OF CATHARINE T. BLACK, ADMINISTRATRIX, THE BANQUE DE GÊNES, AND HANS ANDREASEN, FOR A WRIT OF CERTIORARI TO BE DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO BRING BEFORE THIS HONORABLE COURT THE CONSOLIDATED CAUSE THERE PENDING, ENTITLED

"THE ELIZA LINES, HER CARGO AND FREIGHT,"

WHEREIN ARE FOUR APPEALS FROM THE DECREE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, NUMBERED AND ENTITLED AS FOLLOWS:

No. 368. HENRY P. BOOTH, Appellant,
V.
CATHARINE T. BLACK, Administratrix, et al.

No. 369. CATHARINE T. BLACK, Administratrix, Appellant,
V.
BRADFORD DARRACH et al.

No. 370. BANQUE DE GÊNES, Appellant,
V.
BRADFORD DARRACH et al.

No. 371. HANS ANDREASEN, Appellant,
V.
BRADFORD DARRACH et al.

To the Honorable the Justices of the Supreme Court of the United States:

The Petition of Catharine T. Black, Administratrix, Banque de Gênes, and Hans Andreasen, libellants, appellees, and appellants in the consolidated cause and in the appeals above named, respectively alleges as follows:

I. The several suits consolidated under the above title, the "Eliza Lines, her cargo and freight," were begun by libels filed in 1889, in the District Court of the United States for the District of Massachusetts, as follows:

1. By William W. Black — of whose estate the aforesaid petitioner, Catharine T. Black, is now administratrix — on behalf of himself and of the other part owners of the schooner *Edward E. Barrett*, against the bark *Eliza Lines*, against her cargo of hard-pine lumber, and against her freight money for the carriage of that cargo (Transcript of Record, pp. 7–8).

This was a libel for salvage services performed by the officers and crew of the pilot schooner *Edward E. Barrett*, in bringing into the port of Boston the derelict bark *Eliza Lines*, and her cargo of hard-pine lumber, in September, 1889.

The *Eliza Lines*, at the time, was on a voyage from Pensacola, Florida, to Montevideo, Uruguay, S.A. On account of perils of the seas, her officers and crew had been compelled to leave her, after cutting away her masts, and jettisoning a portion of her deck load in efforts to preserve her, and she was found, five days later, by the salvors, near the Georges Banks, about 80 miles eastward of Nantucket Shoals Light Vessel, on the coast of Massachusetts.

Andreasen, master of the *Eliza Lines*, filed a claim for

the *Eliza Lines* and her cargo, and Bradford Darrach filed an adverse claim for the cargo on behalf of James E. Ward & Company, the owners and shippers of it, praying that it might be delivered to him *without the payment of any freight* (pp. 9–11). Each offered to give stipulation for the cargo.

2. By James E. Ward & Company, acting through Bradford Darrach, against the cargo of the *Eliza Lines*, (pp. 119–121).

This was a libel by the owners and shippers of the cargo to recover possession thereof from the ship owners.

3. By Hans Andreasen, — one of the aforesaid petitioners, — master and part owner of the *Eliza Lines*, on behalf of himself and the other part owners of the *Eliza Lines*, against the cargo of the *Eliza Lines*, and against Bradford Darrach, and against James E. Ward & Company (pp. 133–137).

This was a libel to enforce the lien and claims of the libellants for full freight, — $5,600, — and general average charges. The total general average charges were later, in the Circuit Court, ascertained to be $6,434.10 (p. 248).

4. By the Banque de Gênes, of Genoa, Italy, — one of the aforesaid petitioners, — against the bark *Eliza Lines*, and her freight money (pp. 151–154).

This was a libel to recover £300 (with interest) loaned on bottomry of vessel and freight.

Answers to the several libels, also numerous petitions, motions and other proceedings were filed, and had, in the District Court, not necessary to be detailed in this petition, excepting as herein below stated.

II. The District Court released the vessel to Andreasen upon the usual stipulation (pp. 11, 12):

On October 18, 1888, Andreasen filed a petition, in the

salvage suit, asserting his ability and readiness to settle the claim of the salvors upon both vessel and cargo, and to carry the cargo to its destination, demanding the "right to do so without interference from any person or persons," alleging his lien upon the cargo for the carriage thereof, and for general average contribution, and praying that the Court would order the cargo to be delivered to him, upon his giving due stipulation therefor (pp. 12–126).

Upon the same day, Darrach, in behalf of James E. Ward & Company, the adverse claimants, filed a motion for a sale of the cargo (p. 13).

Upon November 16, 1889, the District Court denied the above petition of Andreasen, allowed the motion of Ward & Company for a sale, and ordered the cargo to be sold at public auction (pp. 13, 73, 74).

It refused to order Ward & Company to give even the ordinary securities, or stipulations, to protect these petitioners from loss, in case the sale of the cargo should prove unjustifiable, or the position of Ward & Company, regarding freight unwarranted (pp. 16, 17, 18, 23, 138, 139); and, on November 29, 1889, in pursuance of said order of the District Court, this cargo — which at Pensacola, the place of shipment, was of the invoice value of $3,460.77 — was sold for $1,825, being entirely unsuited to the Boston market. And the proceeds of sale were further diminished by the expenses of the sale, so that the net balance of proceeds was but $910.74, which the marshal paid into the registry, where it now is (pp. 22, 23, 14).

In 1891 the District Court made final decrees, whereby it awarded salvage, and apportioned it, *pro rata* on vessel, freight, and cargo (p. 70); awarded Andreasen $1,450, "as *pro rata* freight, to be paid only from proceeds of cargo in registry of court;" dismissed the libel of Andreasen as against Darrach, and Ward & Company; referred all questions relating to general average loss to an Assessor

(p. 139); and awarded to the Banque de Gênes "against the bark *Eliza Lines*, $1,458, and interest from the date of the libel, the same to contribute a proportional share of the salvage awarded against ship and freight" (p. 163). And, later, it further decreed that as the sum of $1,450 awarded to Andreasen as *pro rata* freight exceeded $910.74, net proceeds of cargo in the registry, the latter sum be considered as wholly applied to the satisfaction of said *pro rata* freight, subject, however, to the lien of the salvors (pp. 71, 72); and that as said sum of $910.74 had become diminished by decrees in the other cases to $157.23, this latter sum should be paid to Andreasen in satisfaction of his decree for $1,450 *pro rata* freight, and "that no claim for general average is allowed" (pp. 141, 164, 165).

Thus James E. Ward & Company and Darrach escaped from the District Court without any decree against them, or either of them personally.

Thereupon these petitioners, Black, Andreasen, and the Banque de Gênes, each and all claimed appeals to the Circuit Court of the United States for the District of Massachusetts, and all of these appeals were allowed (pp. 165, 72, 73, 142).

III. In 1893 all of these several appeals were heard in the Circuit Court of the United States for the District of Massachusetts; and in 1894 the Circuit Court ordered all of the libels and proceedings aforesaid to be consolidated under the title "The Eliza Lines, her cargo and freight," and thereafter to "proceed, be disposed of and recorded" in that court "as one cause only;" modified the several decrees of the District Court; held James E. Ward & Company personally liable for freight and general average, and sent the case to a Commissioner to compute the amounts due for freight and general average from James E. Ward & Com-

pany, under minute and detailed instructions and directions as to the rules which were to control the Commissioner, and the form of decree which was to result (pp. 206–211).

Upon the coming in of the Commissioner's report, the Circuit Court, in September, 1900, entered its final decree, (pp. 365–373); and from this decree all parties appealed to the United States Circuit Court of Appeals for the First Circuit, — James E. Ward & Co., by Booth, the surviving partner, appealing both on the merits and on the question of damages (pp. 373–381); and the petitioners, Black, by Catherine T. Black, his administratrix, Andreasen, and the Banque de Gênes, appealing chiefly upon the question of damages (pp. 381–387).

Among the errors assigned by these petitioners to the decree, rulings, and findings of the Circuit Court, the principal were to the effect that the Circuit Court had held James E. Ward & Company liable for *net* freight instead of *gross* freight; and also that the Court had ordered the Commissioner to deduct the net freight which was earned by the *Eliza Lines* upon her next voyage, up to the time when she would have completed the voyage to Montevideo for James E. Ward & Company, had she been allowed by them to reload her cargo and complete her voyage, from the net freight found otherwise due from them.

In both of these respects the petitioners believe and claim that the Circuit Court erred, and proceeded in disregard of principles of law, which have never before been questioned either in England or in the United States; and that such disregard has diminished the aggregate amount of the present decrees in favor of these petitioners by more than $2,900.

It was, also, contended, on appeal, by these petitioners that James E. Ward & Company should be required to pay into Court sufficient of the true value of the cargo to satisfy the claims for salvage, freight, and general average, with interest; also the full amount of the gross freight money with interest; or to give stipulations therefor.

And the petitioners contend that, in conformity to the general principles laid down by the Circuit Court in determining the merits of the case, common justice and ordinary protection of their rights as parties demand that this course should be followed.

Other errors assigned by these petitioners related to enlargement of the salvage award, the allowance of interest, etc., and need not be detailed in this petition.

All of the errors assigned by these petitioners were duly considered by the Circuit Court of Appeals (pp. 410–413, 417, 418).

IV. In 1904 (after a re-hearing upon some of the errors assigned by these petitioners) the Circuit Court of Appeals affirmed the decree of the Circuit Court, with the single exception that it ordered the Circuit Court to correct its decree, by allowing a certain additional item of damages,— $1,525.43, with interest, — to the petitioners as against James E. Ward & Company (pp. 459–464).

V. On April 11, 1904, Henry P. Booth, surviving partner of the firm of James E. Ward & Company aforesaid, applied to this Court for a writ of *certiorari*, in said consolidated cause, and on April 18, 1904, this Court granted the application and directed the issuance of a writ of *certiorari* to the United States Circuit Court of Appeals for the First Circuit.

VI. All of the suits and proceedings contained within said consolidated cause, in which the writ of *certiorari* has already been granted, arise out of the same transaction. As was said of them by the Judge of the Circuit Court: "All the various proceedings with which this opinion is entitled constitute in substance but one case. They relate to the distribution of the proceeds of one vessel, her cargo, and

freight. None of them can be wholly disposed of without having regard to one or more of the others. The Court has power to consolidate them, and will do so," (Opinion, Circuit Court, Record, p. 173).

All of the appeals taken therein from the decree of the Circuit Court were heard on the same record in the Circuit Court of Appeals.

The transcript of record on which the application for a writ of *certiorari* was made to this Court by said Henry P. Booth, surviving partner of the firm of James E. Ward & Co., contains the pleadings, proofs, and complete record of proceedings in all of the several suits and proceedings contained within said consolidated cause.

VII. Your petitioners beg leave to refer to the certified copy of the transcripts of record returned from the District Court to the Circuit Court, and from the Circuit Court to the Circuit Court of Appeals for the First Circuit, and the record in the last-named Court which were duly filed with the Clerk of this Court on or about April 11, 1904.

VIII. In *Hubbard* v. *Tod* (171 U.S. 474), this Court has decided that where a case was brought up on *certiorari* from a Circuit Court of Appeals on petition of one of the parties, it will pass only upon the errors assigned by the petitioner, and will not consider errors assigned by the other party.

On the hearing of this consolidated cause, containing these appeals, the petitioners desire to be heard in support of the assignments of error made by them below and for this reason make the present application.

WHEREFORE, your petitioners pray that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court to be directed to said United States Circuit Court of Appeals for the First Circuit, commanding said Circuit Court of Appeals to certify and to send to this Court on a day cer-

tain to be therein named, a full and complete transcript of the record and of all the proceedings in said Court of Appeals in this said cause which is entitled in that Court,

"THE ELIZA LINES, HER CARGO AND FREIGHT,"

wherein are four appeals from the decree of the Circuit Court numbered and entitled as follows:

No. 368. *Henry P. Booth, Appellant,* v. *Catharine T. Black, Administratrix, et al.*

No. 369. *Catharine T. Black, Administratrix, Appellant,* v. *Bradford Darrach et al.*

No. 370. *Banque de Gênes, Appellant,* v. *Bradford Darrach et al.*

No. 371. *Hans Andreasen, Appellant,* v. *Bradford Darrach et al.*

to the end that said cause may be reveiwed and determined by this Honorable Court as provided by law; and that thereupon this Honorable Court will consider the same, will decide the matters in controversy between the parties upon the assignments of error made by these petitioners below, and will grant such other and further relief as law and justice require.

CATHARINE T. BLACK, ADMINISTRATRIX.
BANQUE DE GÊNES,
HANS ANDREASEN,
By GJERT LOOTZ.

UNITED STATES OF AMERICA.
STATE AND DISTRICT OF MASSACHUSETTS.

SUFFOLK, ss. BOSTON, May 18, 1904.

Personally appeared before me, a Notary Public within and for said County and State, the above-named Gjert Lootz, and made oath that he has read the foregoing petition by him subscribed and knows the contents thereof; that the allegations of said petition are true to the best of his knowledge, information, and belief; and that it is not intended for delay.

Witness my hand and notarial seal, at said Boston, the day and year above written.

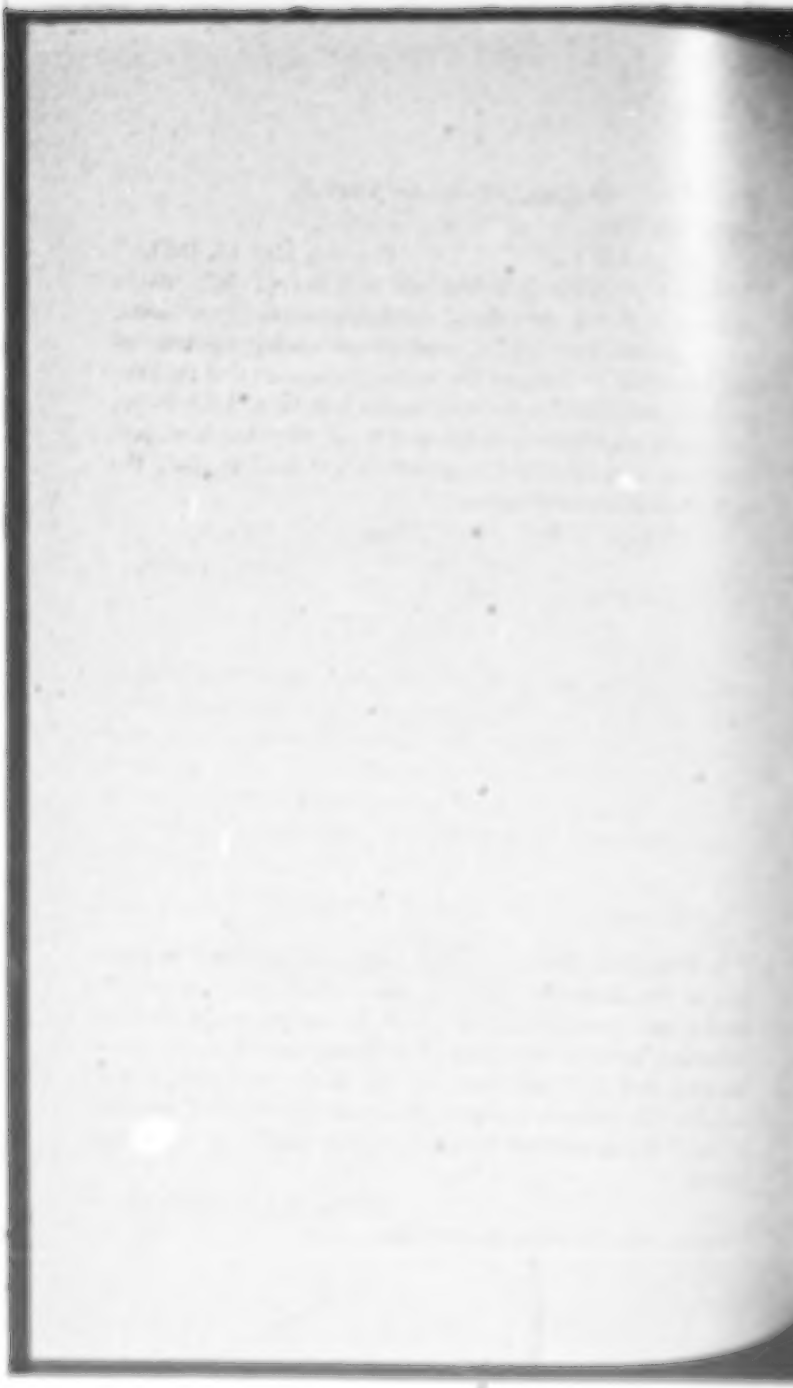
THEODORE W. GORE,
Notary Public.

[SEAL]

I, Edward S. Dodge, having been duly admitted to practice in the Supreme Court of the United States, as an attorney and counsellor of the Court, do hereby certify that the foregoing petition for a writ of *certiorari* has been examined by me; that it is not intended for delay; and that in my opinion the petition is meritorious and well founded in point of law, and is entitled to the favorable consideration of the Court.

EDWARD S. DODGE.

BOSTON, MASSACHUSETTS, May 18, 1904.



[Stamp:]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 302, IN ADMIRALTY.

THE BLACK LIONS, HER CARGO AND FREIGHT.

CATHARINE T. BLACK, Administratrix, &c., of THE GEORGE BLACK, Deceased,

Petitioner and Cross-Libelant.

MOTION.

And now come the said Catherine T. Black, administratrix, Banque de Gross, and Hans Andersen, by their proctor, Frederic Dodge, Edward S. Dodge, John Lowell, and James A. Lowell, and move for a writ of certiorari to be directed to the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, commanding them to certify and return to this Court the whole record and all the proceedings had in the consolidated cause in admiralty lately pending before them, entitled

THE BLACK LIONS, HER CARGO AND FREIGHT,

wherein are four appeals, numbered and entitled respectively:

No. 308, Henry P. Brown, *Appellee*, v. Catharine T. Black, *Administratrix*, et al.,

No. 309, Catharine T. Black, *Administratrix*, *Appellant*, v. Shipping Damage et al.,

No. 310, Banque de Gross, *Appellant*, v. Shipping Damage et al.,

No. 311, Hans Andersen, *Appellant*, v. Shipping Damage et al.

FREDERIC DODGE,
EDWARD S. DODGE,
Proctors for Petitioner,
Catharine T. Black, *Administratrix*,
and Banque de Gross.
JOHN LOWELL,
JAMES A. LOWELL,
Proctors for Petitioner, Hans Andersen.

[Copy.]

SUPREME COURT OF THE UNITED STATES.

October Term, 1903. In Admiralty.

No. 627.

THE ELIZA LINES, HER CARGO AND FREIGHT.

CATHARINE T. BLACK, Administratrix, BANQUE DE GENES, HANS ANDREASEN,

Petitioners for writ of *Certiorari*.

NOTICE.

Please take notice that on Tuesday, the thirty-first day of May, 1904, at the opening of the Court at the Capitol in the City of Washington on that day, or as soon thereafter as counsel can be heard, a motion will be made and submitted to the Court upon the petition in the above entitled cause filed and docketed as above set forth, of which motion the foregoing is a true copy.

FREDERIC DODGE,
EDWARD S. DODGE.
Proctors for Petitioners,
Catharine T. Black, *Administratrix,*
and Banque de Genes,
JOHN LOWELL,
JAMES A. LOWELL,
Proctors for Petitioner, Hans Andreasen.

Boston, May 26, 1904.

To Lewis S. Dabney, Esquire,
Frederic Cunningham, Esquire,
Proctors for Henry P. Booth, *surviving partner, etc.*, and for Bradford Darrach.

BOSTON, May 26, 1904.

Due and sufficient service of the foregoing notice is hereby acknowledged.

LEWIS S. DABNEY,
FREDERIC CUNNINGHAM,
Proctors for HENRY P. BOOTH, *surviving partner, etc.*,
and for BRADFORD DARRACH.

FILE COPY.

APR 6 1905

JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 213. 12.

THE ELIZA LINES, HER CARGO AND FREIGHT.

[Including the following consolidated cases.]

HENRY P. BOOTH, APPELLANT,

v.

CATHERINE T. BLACK, ADMINISTRATRIX, ET AL.

CATHERINE T. BLACK, ADMINISTRATRIX, APPELLANT,

v.

BRADFORD DARRACH ET AL.

BANQUE DE GENES, APPELLANT.

v.

BRADFORD DARRACH ET AL.

HANS ANDREASEN, APPELLANT,

v.

BRADFORD DARRACH ET AL.

ON A WRIT AND CROSS-WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR CATHERINE T. BLACK, ADMINISTRATRIX, LIBELLANT, APPELLEE, AND APPELLANT; AND FOR BANQUE DE GENES, LIBELLANT, APPELLEE, AND APPELLANT.

HARRINGTON PUTNAM,
FREDERIC DODGE,
EDWARD S. DODGE,
for BLACK *and for* BANQUE DE GENES.

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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 213.

THE ELIZA LINES, HER CARGO AND FREIGHT.

[*Including the following consolidated cases.*]

HENRY P. BOOTH, APPELLANT,

v.

CATHERINE T. BLACK, ADMINISTRATRIX, ET AL.

CATHERINE T. BLACK, ADMINISTRATRIX, APPELLANT,

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BRADFORD DARRACH ET AL.

ON A WRIT AND CROSS-WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR CATHERINE T. BLACK, ADMINISTRATRIX, LIBELLANT, APPELLEE, AND APPELLANT; AND FOR BANQUE DE GENES, LIBELLANT, APPELLEE, AND APPELLANT.

STATEMENT OF THE CASE.

The Norwegian Bark Eliza Lines, of which Hans Andreasen was master and part-owner, arrived at Pensacola, Florida, July 1, 1889, under a charter to James E. Ward & Co., of New York, to carry hard pine lumber from Pensacola to Montevideo, for orders, to discharge at Montevideo, or at Buenos Ayres. Among other provisions in the charter party were the following: "The dangers of the seas . . . always mutually excepted. . . . It is understood and agreed that individual responsibility of charterer ceases upon delivery of cargo to the vessel, but the vessel has a lien upon the cargo for all freight, dead freight and demurrage". (Record, pp. 35, 36).

By the terms of the Bill of Lading for the cargo which the Lines took on board at Pensacola, she was to make delivery and receive freight, "as per charter party, (the dangers of the seas only excepted) . . . with average accustomed". (Record, p. 37).

On July 24, 1889, Andreasen, master, executed a Bottomry Bond hypothecating the Bark, and her freight to the Banque de Gênes, of Genoa, Italy, to secure a loan of £300 to pay for supplies and disbursements at Pensacola. (Record, pp. 167, 168).

The Lines sailed from Pensacola, August 13, 1889, and on September 7, 1889, encountered a very heavy gale, which caused her to leak, and otherwise injured the vessel, rendered her unmanageable, destroyed the supply of fresh water for drinking, and caused her to list. In order to right her, a small quantity of cargo was jettisoned, and the foremast and mainmast were cut away, becoming totally lost with spars and rigging attached. On September 11, signals of distress were made to a passing vessel, which took off the officers and crew of the Lines, and carried them in to Port Maitland, Nova Scotia. When thus abandoned she was

about 200 miles southeasterly of Nantucket, but not materially out of the regular course of a voyage from Pensacola to Montevideo, which involves a northerly course from Florida to about Lat. 40° N.

On September 16, 1889, she was found derelict about 75 or 80 miles southeasterly of Nantucket, near Georges Bank, by the officers and crew of the pilot-boat Edward E. Barrett of New York, owned by the original libellant, William W. Black, and other New York pilots, who after exertions and expenditures, (more fully referred to hereafter), brought the Lines into Boston, arriving there on Thursday, September 19, 1889, and thereafter retained possession of vessel and cargo through a watchman employed by them until the Marshal took charge of her under a libel filed by them in the District Court.

Upon being landed at Port Maitland, Andreasen went at once to Saint John, N. B., and there received a cablegram from his owners in Norway. This informed him that the Lines had been brought into Boston, and that he should at once proceed to Boston. He did so immediately, taking with him both mates and the steward. (The crew had shipped for Liverpool at Saint John.) His arrival in Boston was late in the evening of Saturday, September 21. He went to the Lines with his first mate next day, and resumed possession of her, and of her cargo, so far as the salvors would permit.. (See pp. 17–22, below). He was on board with his mates when the Marshal arrested the Lines on the salvage libel, and personal service of the Warrant was there made upon him.

From the time of his arrival at Boston, Andreasen was ready and willing to give bond for the cargo to the salvors, to repair the Lines, and to carry the cargo on to Montevideo. The Lines was completely repaired by him without delay, and was ready for sea again on December 12, 1889, *notwithstanding the delay caused by this litigation.*

The cargo was, however, sold at Boston, by order of the District Court, [NELSON, J.], at the instance of its owners, but against the continued remonstrance and resistance of Andreasen, and the salvors, (as appears pp. 44–46, below).

The owners of the cargo, against the protest both of the master and the salvors, were not required to pay or give security for any freight or general average upon it; the District Court holding that the ship owner's rights were confined to such claim upon the cargo itself as he might have for *pro rata* freight, and for contribution in general average. The price realized at the sale was only a small part of the cargo's real value, and was insufficient to meet an award of *pro rata* freight subsequently decreed.

From the foregoing facts resulted four separate suits in Admiralty in the District Court of the United States for the District of Massachusetts; viz.: —

(*Libel by Salvors against vessel, cargo and freight.*)
(*Record, pp. 7-111.*)

September 26, 1889, Black, on behalf of himself and of the other salvors, filed a libel for salvage against the Bark Eliza Lines, against her cargo of hard-pine lumber, and against her freight money for the carriage of that cargo, (Record, pp. 7–8); and, on the same day, the Marshal, upon warrant and monition issued upon the libel, took the Lines and cargo into his custody, and made personal service upon Andreasen,—"as he is captain of said vessel", who "was on board and in charge at the time of service of said vessel and cargo". (Rec. p. 8).

On the next day, at 9.38 A. M., Andreasen, master, filed a claim praying that the *vessel* and *cargo* be delivered to him upon stipulation. On the same day, at 10.25 A. M., Bradford Darrach, in behalf of Ward & Co., filed a combined intervention and claim praying that the *cargo* be delivered

to him upon stipulation.—"*without the payment of any freight*". (Rec. pp. 9–11).

October 5, 1889, an agreement fixing the value of the *vessel* was filed, (as required by rule of the District Court), Andreasen gave stipulation to the action, for the *vessel*, and she was delivered to him upon a warrant to deliver. At the time of giving this stipulation, Andreasen also offered to give a stipulation in any required sum for the *cargo*. (Rec. pp. 11, 12).

October 18, 1889, Andreasen filed a petition reciting the above proceedings, asserting his ability and readiness to settle the claim of the salvors upon both vessel and cargo, and to carry the cargo to its destination, demanding "the right to do so without interference from any person or persons", alleging his lien upon the cargo for freight and general average, and again praying for delivery of the cargo to him upon stipulation. (Rec. pp. 12–12*b*). On the same day Darrach, the adverse claimant of the cargo, in behalf of Ward & Co., filed a motion for an interlocutory sale of the cargo, representing that its value was "being rapidly diminished by reason of the charges of custody, and other costs and expenses". (Rec. p. 13). On the same day, hearing was had before the District Judge on the above petition and motion and on a libel of Ward & Co., for possession of the cargo, (hereinafter referred to), filed on the same day. (Rec. pp. 119–121).

November 16, 1889, the District Judge denied Andreasen's petition for delivery of the cargo to him, allowed Darrach's motion for an interlocutory sale of the cargo, and ordered it sold at public auction, the warrant for sale issuing November 19. (Rec. pp. 13, 73, 74). In pursuance of this order, the cargo was sold by the Marshal, November 29, and the proceeds of its sale, amounting to $910.74, were, on December 23, paid into the registry of the District Court, where they now are. (Rec. pp. 13, 14).

November 26, 1889, Darrach filed an amended claim, praying to substitute the Atlantic Mutual Insurance Company of New York in the place of Ward & Co., "as the claimant on whose behalf he claims the said cargo", (Rec. pp. 14, 15); and on November 27, this amendment was allowed. (Rec. p. 18).

November 27, 1889, Black, for the salvors, filed a petition, reciting the above proceedings and praying that Darrach and Ward & Co. be ordered to appear and show cause why they should not pay the full freight money, (amounting to $5600.), into Court, to answer to the exigency of the salvors' suit, (Rec. pp. 16, 17); and, upon the same day, the Court ordered a summons issued to Darrach, and to Ward & Co., commanding them to show cause; and further ordered this summons to be served on the proctors for Darrach and Ward & Co.; and it was so served on November 29. (Rec. pp. 17, 18).

To complete the Record of proceedings in this suit, the Court later, (January 16, 1891), allowed the filing of a motion by Black as of the same November 27, 1889, for a stipulation to be given by Darrach or Ward & Co., to answer the above petition to show cause, for the payment of the freight into Court (or of such portion as might be ordered), and for the suspension of the sale until such stipulation should be given. An order disallowing the motion was also entered as of November 27, 1889. (Rec. p. 23).

December 9, 1889, Darrach and Ward & Co. filed an answer to Black's petition of November 27. (Rec. pp. 18–21). Andreasen duly filed answer to the original libel of Black. (Rec. pp. 21, 22).

(*Libel for possession by cargo-owner against cargo.*)
(*Record, pp. 119-127.*)

October 18, 1889, Ward & Co., by Darrach, filed a libel for possession against the cargo of the Lines. (Rec. 119–121).

November 29, 1889, Andreasen claimed the cargo, praying that it might be delivered to him on stipulation, and filed an answer. (Rec. pp. 121–124).

February 27, 1890, Ward & Co. filed a motion that their libel for possession be dismissed, as of November 19, 1889, on the ground that on that day a warrant had issued for the sale of the cargo, in the suit of Black for salvage. (Rec. pp. 124, 125).

(Libel by master against cargo and cargo owner for freight and general average.)

(Record, pp. 133–143.)

November 27, 1889, Andreasen, master, on behalf of himself and the other part owners of the Lines, filed a libel against the cargo, and against Darrach and Ward & Co., to enforce the lien and claims of the libellants for full freight,—$5,600,—and general average charges. (Rec. pp. 133–137). The above proceedings were recited in the libel. Upon the same day, the Court ordered a warrant and monition to issue, and to be served on the proctors for Darrach and Ward & Co.; and it was so served on November 27. (Rec. p. 137).

To complete the Record of proceedings in this suit, the Court later, (January 16, 1891), allowed the filing of a motion by Andreasen as of the same November 27, 1889, for the usual stipulations to the action and for costs to be given by Darrach or Ward & Co. to his libel, and for the suspension of the sale until such stipulations should be given. An order disallowing the motion was also entered as of November 27, 1889, (Rec. pp. 138, 139).

December 6, 1889, Darrach and Ward & Co. moved to dismiss this libel, denying that sufficient service had been made upon them, and that the Court had no jurisdiction to require them to answer. (Rec. p. 138)

(*Libel by Bottomry lender against vessel and freight.*)
(*Record, pp. 151–171.*)

December 7, 1889, the Banque de Gênes filed a libel against the vessel "and her freight earned on the carriage of the cargo of lumber recently unloaded in Boston", to recover £300, (with interest), loaned on bottomry of vessel and freight, at Pensacola. (Rec. pp. 151–154). On the same day, (December 7), Andreasen filed a claim for the vessel, with the usual stipulations, and February 8, 1890, an answer to the libel, (Rec. pp. 154–159). Art. 7 of this Answer alleged that freight was due him upon the cargo sold at Boston and referred to his suit to recover said freight (p. 157). [It also denied the validity of the bond, but this defence was overruled in the Circuit Court and thereafter abandoned.]

(*Orders and decrees in District Court.*)

The order of the District Court for an interlocutory sale of the cargo,— (see pp. 4, 5, above), set forth "that the ship having been abandoned at sea by the master and crew, without any intention to retake possession, the cargo owner has a right to treat the contract of affreightment as at an end, and that the only remaining interest of the ship owner in the cargo is a claim for *pro rata* freight, and for any general average contribution that may hereafter appear". (Rec. pp. 13, 73, 74).

January 16, and May 13, and 14, 1891, the District Court made final decrees in each of the above 4 cases.

(*In the salvage suit.*)

It awarded Black $1755. salvage (including $350. for salvors' expenses) with $313.06 costs, all to be apportioned *pro rata* on vessel, freight and cargo.

It ordered that the proceeds in Court of the sale of the cargo be wholly applied toward *pro rata* freight on the cargo (see below pp. 9, 10), but subject to the salvors' lien thereon.

The salvors were, in other words, to recover:

From vessel (appraised at $2250.)	$1,472.17
From cargo (proceeds $910.74)	595.89
Making a total award as above, including costs,	$2,068.06

(Rec. pp. 70, 71, 72.)

(*In suit for possession of cargo.*)

It dismissed the Libel by Ward & Co. (for possession). (Rec. p. 125).

(*In the master's suit for freight, etc.*)

It awarded to Andreasen, master, "as *pro rata* freight to be paid only from the proceeds in the Registry" $1450., (an amount which the proceeds referred to were insufficient to satisfy).

It dismissed the Libel as against Darrach and Ward & Co. without requiring them even to make good the *pro rata* freight above allowed.

As to the General Average contribution sought to be recovered by the master, all questions of general average were referred to an Assessor.

The subsequent report of the Assessor having shown that the total general average loss was $4818., and the proceeds in Court having by the decrees in favor of the salvors and the Bottomry lender become diminished to $157.23 (see below), the Court ordered the balance of $157.23 paid to Andreasen in satisfaction of the above award of $1450. "*pro rata* freight" and disallowed entirely his claim for general average contribution, not because no contribution was due, but because no funds wherewith to satisfy it remained in the Registry, and the Court would not hold Ward & Co. beyond funds in the Registry. (Rec. pp. 139, 140, 141.)

(*In suit on Bottomry bond.*)

It found that the Banque de Gênes "was entitled to recover" against vessel and freight the full amount of its bond and interest thereon amounting to $1582., with costs.

But it allowed actual recovery only as follows:

After deducting the salvage and costs awarded there was left of the value of the vessel and of the freight as the Court has estimated it only $1092.68, viz.:

Appraised value of vessel . .	$2,250.00	
Less salvage and costs . . .	1,472.17	
		$777.83
Proceeds of cargo, treated by the Court as representing *pro rata* freight .	$910.74	
Less salvage and costs . . .	595.89	
		314.85
		$1,092.68

Instead of giving the whole of this balance to the Banque de Gênes towards the $1582. and costs found due it,— only that proportion of the $1582. was allowed which that sum bore to the total values of vessel and freight as above, before the deduction of salvage. The result was that the Banque was to receive only $546.84 in all,—$389.22 to be paid by the stipulators for the vessel, $157.62 out of the proceeds of cargo in Court. (Rec. pp. 163, 164, 165).

This left of the proceeds in Court $157.23, decreed to the Master on account of *pro rata* freight as above stated.

Thus Darrach and James E. Ward & Co. escaped from the District Court without any decree against them, or either of them, personally.

(*Appeals claimed in District Court.*)

Black, Andreasen and Banque de Gênes, all appealed from the several decrees in which they were concerned, and

also from the several interlocutory orders and decrees which had been made; and their appeals were allowed. (Rec. pp. 70, 71, 72, 73; 125; 139, 142; 164, 165).

Ward & Co. took no appeal from any of the decrees of the District Court.

The above appeals were to the Circuit Court, the Act establishing the Circuit Court of Appeals not having gone into effect at the time.

(*Orders and Decrees in Circuit Court.*)

The result of the above appeals was that after ordering all the above cases consolidated under the title "The Eliza Lines, her cargo and freight", and thereafter to proceed as one case only, the Circuit Court held, (April 3, 1894),—

1. That the sale of the cargo, upon the application of Ward & Co., was not a sale for necessity, nor authorized under Admiralty Rule 10, and was wrongful, and that they were liable for freight and in general average as if it had not been sold. (Rec. pp. 177–181, 198).

2. (*a*) That the attempted substitution of the Atlantic Mutual Insurance Company in the place of Ward & Co., as claimant of the cargo, which had been ordered by the District Court, was unwarrantable and inoperative; and the Court accordingly struck the application of Ward & Co. for such substitution from the record. (Rec. p. 181).

(*b*) That Darrach, being merely agent of Ward & Co., should be dismissed from the consolidated case, (Rec. p. 189), leaving Ward & Co., as the parties before the Court, representing the cargo and responsible for its liabilities.

(*c*) That the District Court acquired jurisdiction *in personam* against Ward & Co., both through the acts and proceedings of Ward & Co., and through the service directed by the District Court, on the proctors for Ward & Co. (Rec. pp. 189–195).

3. That the Bottomry Bond was valid; and the Court

ordered a recovery upon it against vessel and freight. (Rec. pp. 184–189).

4. That Andreasen should have been allowed to receive delivery of the cargo from the Marshal on giving proper stipulations, for the purpose of completing the voyage, and that accordingly, not the cargo only but Ward & Co., personally, were liable for freight, and not merely for *pro rata* freight but for the full net freight pending; and that they were also liable to Andreasen as master for general average and other charges. (Rec. pp. 195–206).

5. That the freight to be recovered from Ward & Co. was not gross freight, but only net freight. (Rec. pp. 207–208).

6. That any net freight which was earned by the Lines upon a voyage from Boston for which she had chartered after the sale of this cargo, up to the time when she would have completed the voyage to Montevideo for Ward & Co., had she been allowed by them to reload her cargo and complete her voyage, should be deducted from the net freight found otherwise due from Ward & Co. (Rec. pp. 208, 209).

7. That the *proportion* of the property saved awarded the salvors should not be disturbed; and that Black was entitled to recover the same proportion of the freight ordered to be paid by Ward & Co., as salvage of freight, as of the vessel and cargo, (p. 189).

8. The value of the cargo for the purposes of computing salvage was taken to be only the net proceeds in the Registry, of its sale at Boston, although this amount ($910.74) see above, p. 5, was shown to be only a small proportion of its invoice value, and a still smaller proportion of its value at its port of destination.

(The District Court as shown above had appropriated these proceeds wholly to the satisfaction of claims upon *freight* — thereby leaving nothing to answer claims upon *cargo*.)

The Circuit Court then referred the cases to a Commis-

sioner, under minute and detailed directions as to the rules which were to control him, to compute freight, general average, and additional salvage upon freight. (Rec. pp. 206–211). The report of the Commissioner was made and confirmed by the Circuit Court which thereupon, (Sept. 26, 1900), made its final decree, against the vessel, the proceeds of the sale of the cargo in the registry, and against Ward & Co., personally, for salvage, freight, general average and bottomry, and also against Ward & Co., for interest upon some of the items of the decree, and for a portion of the costs, (Rec. pp. 365–373), — all in accordance with the principles laid down by said Court as above summarized.

The following summary of the results of this Decree so far as the salvors and bottomry lender are concerned is here presented in the hope that it may save trouble in following the figures and details of the Commissioner's Report and the Decree itself, which are somewhat complicated and confusing.

In the salvage suit. The salvors were to recover as in the District Court (p. 9 above).

From vessel (appraised at $2250.) . . .	$1,472 17
From cargo (proceeds $910.74, but now treated as representing cargo, independently of freight due)	595 89
From freight (to be paid by Ward & Co., now held liable to pay net freight) . . .	996 33
Making salvors' total recovery . . .	$3,064 39

irrespective of $82.02 interest and $374.37 costs also allowed them against Ward & Co.

Final Decree, Rec. pp. 367, 368.

The salvage here awarded against freight is estimated upon two-thirds of the full freight pending only, one-third being deducted for estimated expense of earning it. The calcula-

tion is presented by the Commissioner, (Rec. p. 251). To this deduction the salvors object, as below argued.

[A further deduction ordered by the Circuit Court from the full freight, of $1525.43 for the contribution of the freight in general average was held erroneous by the Court of Appeals (see below and Rec. p. 463), and to the above salvage award is thereby added $686.44.]

In the suit on the Bottomry bond. The amount due the Banque upon its bond with interest having been ascertained at $2403.03, for which vessel and freight were liable, $777.83, the remainder of the vessel after deducting salvage, was appropriated toward its payment, as was also $314.85, the remainder of the proceeds of the cargo after deducting salvage. [The Circuit Court treated this appropriation of the balance of cargo proceeds as part satisfaction of Ward & Co.'s liability for freight, and in ascertaining whether they owed the master for freight and general average contribution they were also allowed credit for the cargo proceeds.] Toward the payment of $1310.35 still remaining due the Banque the Court further appropriated, so far as it would go, the recovery ordered by it in favor of the master against Ward & Co., of everything then remaining due from them on account of freight or the cargo's contribution in General Average, and this balance was ascertained to amount, with interest, to $975.52, which Ward & Co. were to pay the Banque,— leaving, as will be seen, a considerable amount of the Banque's claim still unsatisfied.

Final Decree, pp. 369-372.

[The correction of the Decree ordered by the Court of Appeals by disallowing the deduction of $1525.43 in ascertaining net freight to be paid by Ward & Co. will have the effect of adding to the above recovery from Ward & Co. the amount of $838.99, which will satisfy the Banque in full and leave

a balance to the master on account of his claim for freight and general average.]

(*Appeals claimed in Circuit Court.*)

December 4, 5, 1900, Henry P. Booth, surviving partner of Ward & Co. (Rec. pp. 373–381); Black, Administratrix (pp. 381–383); The Banque de Genes (pp. 383–385); Hans Andreasen (pp. 385–387); all claimed, and perfected, (pp. 373, 387–393) their several appeals to the United States Circuit Court of Appeals, which were duly allowed.

(*In the Court of Appeals.*)

January 28, 1904, the Court of Appeals affirmed the above decree of the Circuit Court except only that the following modification was made, (in consequence of rehearing). (Rec. pp. 459–464).

Whereas the Circuit Court had deducted from the full amount of freight as established by it, $1525.43 as the amount of freight's contribution to General Average, and had awarded salvage upon the remainder only, — the Court of Appeals held the full amount of freight, without such deduction, subject to salvage. It was of course clear that salvage was the first claim upon the freight. The amount of the salvor's decree against Ward & Co. was thus increased by 45% of $1525.43 with interest; the amount of the decree in favor of the Banque and of the master, by the remaining 55% of the same sum.

SPECIFICATION OF ERRORS RELIED ON.

Ward & Co. rely in this Court upon errors assigned by them to the decree of the Court of Appeals, which are first discussed in the Argument below, pp. 17–52.

The salvors rely in this Court upon the following alleged errors in said decree, next discussed in the Argument below, pp. 53-66.

(1) Having found that Ward & Co. were liable for freight as if the voyage had not been broken up and the vessel sold, and that the salvors were entitled to compensation out of the freight so due, the Court erred in holding as above that the freight so liable to pay salvage was not the *gross* freight pending but was only *net* freight.

(2) Having found as above that Ward & Co. were liable for the various claims against the cargo as if the same had not been sold, the Court erred in holding as above that the value of the cargo for the purposes of the salvage claim upon it was represented only by the proceeds of its sale in Court, and in confining its award of salvage against cargo to a percentage of those proceeds; whereas it should have awarded salvage upon the cargo at its value for purposes of delivery after deduction of freight, and should have held Ward & Co. liable for the whole salvage so awarded.

(3) The Court erred in not awarding to the salvors a greater proportion of the value of the vessel, of the freight pending and of the cargo (however the value thereof be ascertained) as salvage compensation; whereas it has adhered to the proportion adopted in the District Court (45%) although the salvage thus ascertained included actual expenses incurred by the salvors to a large amount, and reduces their compensation for services to a proportion greatly below that usually allowed in cases of derelict.

The Bottomry lender also relies in this Court upon the error in computing freight alleged under (1) above; claiming that gross and not net freight was liable to it. See pp. 67, 68, below. It complains further that the Court in ascertaining net freight for the purpose of its suit has made a deduction from gross freight not made as against the salvors (p. 68).

BRIEF OF THE ARGUMENT FOR SALVORS.

(ARGUMENT ON ERRORS ASSIGNED BY WARD & CO. TO DECREE OF COURT OF APPEALS)

I.

The District Court erred in treating the voyage as broken up, notwithstanding the master's desire to continue it; and in ordering the cargo sold at Boston without requiring the cargo owner to pay or stipulate for freight.

This sale, and the subsequent decrees confining all claims upon cargo or freight to the net proceeds realized, deprived the salvors of a great part of their rightful claim against freight and cargo.

The Appellate Courts were right in correcting these errors.

1. The abandonment of the vessel was compelled by sea peril and was fully justified by the circumstances. There is no claim that it might have been avoided. It is therefore properly described as *involuntary*.

A very heavy gale, beginning September 7, had caused the vessel to leak, carried away her bulwarks, and rendered her unmanageable. On September 9, the gale became more severe, and the vessel became listed. Part of the deckload, —3000, or 4000 feet,— was thrown overboard, but the vessel did not right; and after consultation with his officers and crew, the master decided that it was necessary to cut away the masts in order to save the vessel from total loss by capsizing, with her cargo and crew.

On September 9, accordingly, the foremast and mainmast were cut away. With the spars and rigging attached to them and the mizzentopmast, they became totally lost. The vessel then righted. (*Andreasen*, Rec. pp. 25–27, Ints. 17–29, 37–45).

Two days after cutting away the masts, the Edith Mary was sighted, and, in reply to signals of distress, came up to the Lines, took off her officers and crew, and carried them into Port Maitland, Nova Scotia. (*Andreasen*, Rec. pp. 26, 27, Ints. 30–36).

When her officers and crew thus left her, September 11, in latitude 38° 37′, north, longitude 67° 24′, west, (about 200 miles southeasterly of Nantucket) as above, they left her because "the ship was leaking and had no rigging to help herself with",— and the supply of fresh water for drinking was destroyed. (*Andreasen*, Rec. pp. 26, 27, Ints. 30–36; p. 32, Int. 109).

2. As soon as he could get there after the news reached him that his vessel had been brought into Boston, the master of the vessel went to Boston, with his officers.

This news reached him at Saint John, whither he had gone from Port Maitland where he first reached the shore, cabling while on the way to his owners in Norway. Their cablegram in reply reached him at Saint John, and he left there the same day for Boston.

Rec. pp. 27, 28, Ints. 48–51.

His purpose in going was to resume possession of the vessel and continue the voyage, if the condition of vessel and cargo proved to be such as to permit it. As soon as he had had opportunity to ascertain their condition, his intention to continue the voyage was formed.

Rec. p. 29, Ints. 67, 68.

3. The voyage might perfectly well have been continued, and without delay sufficient to affect the rights of the parties to the Charter Party.

As to the *vessel*,— that the voyage might and would have been continued, so far as she was concerned, is established by the fact that the master did in fact repair her at Boston

and did start from there with her upon another voyage with another cargo, soon after the sale ordered by the District Court had deprived her of this cargo.

Rec. p. 29, Ints. 70-76.

As to the *cargo*, it was very little damaged and the damage would not have been increased by continuing the voyage.

Rec. pp. 76, 77, Ev. of *West*.

As to the *delay involved*, the vessel was ready, after completing all repairs and finding a new charter, to load for the new voyage on December 12th. (Ev. of *Lootz*, Int. 26, p. 92).

This was less than three months after she was brought in to Boston (September 19) and less than one month after the sale of her original cargo (November 29).

Had she been allowed to resume her original voyage without objection, the Commissioner appointed by the Circuit Court finds, upon uncontradicted evidence, that she would have been ready to start from Boston October 27 (a month before the sale), and that her arrival at the original port of destination would have been not later than January 1, 1890. (Rec. p. 250).

The average length of the original voyage on which she left Pensacola, August 19, is from 85 to 90 days. (Ev. of *Gorham*, p. 80, Int. 16).

So that the cargo would not have been expected at Montevideo before November 6, 1889, even if there had been no interruption to the ordinary course of such a voyage.

Such a delay was wholly insufficient to afford any ground for breaking up the voyage. The Circuit Court so held, (Opinion, p. 196). There is no claim to the contrary.

4. Everything that the master could do to indicate his desire and intention to resume the voyage was done by him, immediately after he reached the vessel.

He reached Boston on the evening of September 21,—two days after the vessel got there. He went on board September 22. He visited the vessel every day thereafter, she being during this time in the salvors' custody, and was on board with their consent when the vessel was arrested on their libel. Service of the warrant was there made on him.

Rec. pp. 28-31, Ints. 53–56, 61–63, Cross-Int. 98.

The warrant contains the express direction that it be so served.

Rec. p. 8.

Immediately upon the filing of the salvors' libel (September 26) he filed his claim for vessel *and cargo* (September 27). He filed stipulations and released the vessel October 5, offering, at the same time, "to give stipulation in any required sum, with sureties for the cargo." (Rec. p. 11). In his claim filed September 27 he offered stipulations for the release of the *cargo*. He repeated this offer October 18, in his motion for delivery of the cargo to him. (Rec. pp. 12–12*b*.)

There is no claim that his above offers were not made in good faith or would not have been carried out if the court had allowed them to be carried out.

He was ready and willing to repair his vessel and carry the cargo on, up to the time it was sold by order of the District Court. He was ready and willing from the time vessel and cargo were arrested on the Salvage Libel to bond and release vessel and cargo. (Rec. pp. 29, 30, Ints. 67, 73, 82, 83). This has not been questioned.

5. The master's intention to continue the voyage was formed before any objection was raised by the cargo owner to his continuing it.

No intimation to him or to anyone who can be said to have represented him, of such objection, is shown to have

been given until he had been five days in Boston. The intimation then given consisted only of a verbal statement between counsel on September 26. (*Stipulation*, Rec. pp. 109, 110.) It was at most an intimation of an intent to file a claim for the cargo, and this would not have implied an intent to break up the voyage, because it would have been entirely regular and proper for the owner of the cargo to claim it and stipulate for it in order that the vessel might carry it forward. (*The Soblomsten*. L. R. 1 A. & E. 293, 298).

Andreasen, p. 28, Int. 53.

On September 26 the vessel had been in Boston a week. The cargo owners had had knowledge of her arrival at Boston since the day of her arrival, September 19. On that day they abandoned the cargo to its underwriters.

Nicoll, Rec. pp. 37–39, Ints. 1–6, Cross-Int. 7, and see Letter of Abandonment, p. 41.

The cargo owners were at no greater distance from Boston than New York. Yet at no time prior to the filing of their claim in the salvage suit (September 27) had there been any express notice to the master or his owners that they objected to its being carried on. Nor is any demand for it upon the salvors proved.

6. Before any attempt at interposition by the cargo owners, therefore, the master had done everything then in his power to regain complete possession of vessel and cargo.

He was on board his vessel whereon the cargo was then remaining as originally laden, save only a small part of the deckload which had been jettisoned,— an inconsiderable proportion of the whole cargo. He had his officers whom he had brought with him also on board. His clothing, chronometer, instruments of navigation and charts, also the property of his officers, were on board where they had been left.

Andreasen, Rec. pp. 28, 29, Ints 53–65; pp. 30–32, Cross-Ints. 86–102; Ints. 103–106.

A material part of his voyage to Montevideo had been completed, and the vessel was not far out of her regular course upon such a voyage. The course from Florida is North to Lat. 40° N., then East, and then South. (Ev. of Gorham, Rec. p. 79, Ints. 9–12.)

If it be said that the salvors were still in possession and he was on board only by their permission, their possession was only for the purpose of securing their claim for compensation and was not necessary for that purpose, the vessel being where they could libel her at any moment and unable to leave port until repaired. For all other purposes possession was in the master. As to this see further below (pp. 34–36.)

Payment of the salvage claims would at once have vested him with complete possession, but it is obvious that a decree fixing the amount of those claims was necessary for his protection; because without such a decree the amount would have remained open to question in the General Average settlement.

As soon as the Court's possession under their libel had taken the place of the salvors' possession, he obtained complete possession of the *vessel* by claim and stipulations. He was prevented from obtaining complete possession of the *cargo* in like manner only by the adverse claim filed by the cargo owner subsequently to his own, which adverse claim he has from the time of its filing contested in every possible way.

7. The following conclusions of the Court of Appeals (Opinion, p. 408) cannot be questioned upon anything in the case:

> "We are not dealing here with a situation where the carrier does not choose to stipulate, or where no intention is shown, nor reasonable effort made, to reclaim the

property. . . . After the vessel and cargo in question were brought into port, the ship-owner speedily got possession of his vessel and made prompt and reasonable effort to regain possession of the cargo and to discharge the obligations to the salvors, and go on with his voyage."

8. The District Court, however, refused his application to stipulate for and carry on the cargo, granted instead the application of Ward & Co. to have it sold, and thus put an end to the voyage which he wished to continue and complete.

The District Court based its action upon the proposition of law that the cargo owner had the right to treat the contract of affreightment as at an end, because the vessel had once been abandoned by the master and crew "without any intention to retake possession". (Opinion, Rec. pp. 73, 74.)

This doctrine, which the Circuit Court and Court of Appeals refused to adopt, has never yet been adopted by the courts of this country.

If it has the support of any English decisions, it should not be adopted here; because it is manifestly unfair and unjust.

9. The *English decisions* relied on by Ward & Co. are:

The Kathleen, L. R. 4 A. & E. 269 (1874); 2 Asp. M. C. 367; 43 L. J. Adm. 39; 31 L. T. 204; 23 W. R. 350.

The Cito, L. R. 7 P. D. 5 (1881); 4 Asp. M. C. 468; 51 L. J. Adm. 1; 45 L. T. 663; 30 W. R. 836.

The Argonaut, Shipping Gazette 1884, p. 775.

The Leptir, 5 Asp. M. C. 411 (1885); 52 L. T. 768.

The Arno, 8 Asp. M. C. 5 (1895); 72 L. T. 621.

As to *The Kathleen*, the facts that the cargo in that case was perishable (cotton), was fast deteriorating, and that its

sale was for the advantage of all parties, are sufficient to prevent it from applying in any event to the case at bar, where the cargo is lumber, "the least perishable of all cargoes", as was said in *The Argonaut*, *supra*.

Sir Robert Phillimore held (page 277): "In this case the vessel was a derelict; in other words, the owner, through his agent, the master, had abandoned all possession of the ship, and at the time of abandonment had certainly lost all rights to freight or to carry on the cargo".

This ruling was not supported by any previous authority, and, as will be seen, has not been sustained to its full extent by the later English decisions. Its injustice, as a general principle of law, is well pointed out in the Opinion of the Circuit Court, p. 201.

In *The Cito*, Sir Robert Phillimore applied the rule laid down in *The Kathleen* to a cargo not perishable. But the Court of Appeals, affirming his result under the particular circumstances of the case, declined to say, as he had said, that the contract of affreightment was absolutely dissolved by the mere abandonment of the ship. They did hold, however, that the abandonment gave the cargo owner the right to treat the contract as dissolved, and this decision, having the support of Lord Esher's authority, has since been followed and quoted as the English law on the subject.

The Argonaut, *The Leptir* and *The Arno*, *ubi supra*, upon this point simply follow *The Cito*, without further authority. The text writers who have followed it are referred to in the Opinion of the Circuit Court, pp. 199, 202, 203. *The Argonaut* and *The Arno* were also before Lord Esher and the principal judgment in each of those cases was delivered by him.

No such doctrine as is declared in *The Cito* is found in any English decision or text writer prior to 1881, as is pointed out in the Opinion of the Circuit Court, p. 199,—*The Kathleen* only excepted.

Nor has *The Cito* been accepted without demur in England, as pointed out in the Opinion of the Court of Appeals, p. 409. The passage there referred to from Wendt's "Maritime Legislation" (3d Ed. 1888, Chapter VII., pp. 627–629) is as follows:

> (P. 629)—"So long as this 'Cito' decision stands, it gives the cargo-owner the full option to take advantage of the common misfortune for the purpose of evading the contract entered into by him. This, I confidently assert, is opposed to every principle of law and justice. A contract by the law of every civilized country holds good until both parties to it, of their own free will, agree that it shall not be carried out. Now, how can the abandonment of a ship in such a case as the 'Cito' be taken to be an expression of an agreement on the part of the owners of the vessel to cancel the contract? The action of the crew in leaving a vessel to save their lives is not an act of will at all; they have to desert their vessel under the pressure of a *vis major*; how can this be taken to show an agreement on the part of the shipowner to abandon his part of the contract? He has no power to exercise any option at all. If, when the vessel is recovered and the owner again requires the power to exercise his will in the matter, he then elects not to carry out his contract and the cargo-owner agrees, well and good, the contract is put an end to by mutual consent. To assume, however, such consent on the part of one of the contracting parties from an action forced on his servants by a power which cannot be resisted seems to me to be a doctrine utterly opposed to common sense."

Other indications of dissent are noticed by the Circuit Court in the Opinion referred to (p. 201) and by the Court of Appeals (p. 409).

It should further be noted that in no one of the English cases above referred to was there any *bona fide* attempt by the master to regain possession of the vessel and cargo in order to complete the voyage, accompanied by a *bona fide* offer to give security for the salvage claims upon both for that purpose prior to the cargo owner's application for the cargo; as was the case here.

(For the facts in *The Cito* see L. R. 7 P. D. 9 (Cotton, L. J.) or 51 L. J. Adm. 1).

If it be claimed that the *The Arno* is an exception to the foregoing statement, the master's attempt at regaining possession in that case consisted only in going on board and rendering some assistance with a tug, just as the salvors were bringing vessel and cargo into their port of destination, and therefore not until after the cargo owner's notification that the contract of affreightment was to be treated as at an end. Since the salvors did the actual work of bringing the cargo to its destination and were in any event to get salvage on it at its value there, which would include freight, it made no difference to them, as it does in the case at bar, whether freight was payable or not as between vessel and cargo.

The Arno, however, is no doubt the most extreme application of the doctrine of *The Cito* yet made and on the principles contended for in this brief the one which shows most clearly the injustice of that doctrine.

Nor had the ship owner in any of these cases a claim for general average sacrifices previously made for the preservation of the cargo, as was the case here.

It thus appears that in England the doctrine of *The Cito* is at most a "modern declaration how the rule ought to be laid down" (Opinion Circuit Court, Rec. p. 199),— also that Lord Esher is chiefly responsible for it, — and that there are strong reasons against it. Under these circumstances no disrespect to Lord Esher's deservedly great authority is

involved in recalling that his views upon not a few questions of commercial or maritime law, failed to receive the approval of the highest English Court of Appeal, before which this question has never come. (See *Glyn* v. *E. & W. I. Dock Co.*, L. R. 7, A. C. 591; *Sewall* v. *Burdick*, 10 A. C. 74; *The Xantho*, 12 A. C. 503; *Hamilton* v. *Pandorf*, 12 A. C. 518; *Blackburn* v. *Vigors*, 12 A. C. 531; *Hamilton* v. *Baker*, 14 A. C. 209.)

10. *The American cases* relied on by Ward & Co. support no such proposition of law as that laid down in *The Cito*, still less such a proposition as laid down in *The Kathleen*.

Post v. *Robertson*. 1 Johns. 24 (1806),
Dunnett v. *Tomhagen*, 3 Johns. 154 (1808),

hold not that the contract of affreightment is necessarily *dissolved* once the vessel has become derelict through sea peril; but that the contract has not been *performed* so as to earn freight, if the vessel is brought to her port of destination by salvors from whom the cargo owner receives it without any further interposition on the vessel owner's part.

When in the first case *Livingston*, J., refers in his dissenting opinion to the contract of affreightment as "dissolved from the moment the vessel was abandoned" (p. 29), the statement was probably true of the contract before him, because the vessel owner never, so far as appears, manifested any intention or desire after the abandonment to treat the contract in any other manner; but the remark lends no sanction to the general proposition contended for, because no such question was before the Court.

The Mansanito, 22 Fed. Cas. 13,075 (S. D. N. Y. 1861), contains no statement of the grounds upon which the vessel owner's offer to complete the voyage was not regarded by the Court; but the report does show that no such offer was made

until after his vessel had been sold to satisfy the salvage claim, also that the port of destination was a blockaded port, — circumstances which in themselves furnished sufficient reason for the result reached.

The James Martin, 88 F. R. 649 (E. D. Va. 1883), was a case of intentional or unjustified abandonment of the vessel by master and crew. Not only was the claim for freight made after the salvor's recovery of vessel and cargo disallowed, but the vessel owner was ordered to make good the amount awarded against the cargo as salvage. The Court said that the affreightment contract was not dissolved, because it existed as the foundation of a claim for damage to the cargo. It also said that had the master's abandonment of the vessel been honest, it would have been his duty to go to her relief as soon as he reached shore (p. 656). This cannot be disputed, and it is wholly inconsistent with the theory that an honest and necessary abandonment of the vessel such as took place in the case at bar, works a dissolution of the contract; whatever support for such a theory may be found in any of the language of the learned judge.

The Elizabeth and Jane, 1 Ware, 41 (Dist. Maine 1823), has been fully discussed in the opinion of the Circuit Court (pp. 204, 205). The case was like *Post* v. *Robinson* and *Dunnett* v. *Tomhagen*, *supra*,— in that the vessel owner (who here owned the cargo also) made no attempt to continue the voyage. The situation was the same as if there had been a contract which both parties agreed to abandon, as on the facts they might well have done. Their abandonment of the contract would have dated from the abandonment of the wrecked vessel, but whether the abandonment of the vessel *per se* would have terminated the contract (had there been one) was not a question involved.

The Nathaniel Hooper, 3 Sumner, 542 (1839). If the doctrine adopted by the District Court and contended for

by Ward & Co. had been known to Judge Story when he delivered this judgment, he could not have omitted, as he did, all reference to it ;— nor could he have allowed *pro rata* freight, as he did (upon the finding that the cargo owner's acts had amounted to a voluntary acceptance of the cargo at the port of distress) ;— nor could he have said, as he did, (pp. 564, 565, 566) that full freight would have been due on the facts before him, had the master been ready and willing to continue the voyage ;— nor could he have treated the case, as he did, (p. 559) as not different in principle from those in which sea peril has compelled delay and unlivery of the cargo, but has not forced the master and crew to leave her.

That Judge Story well knew of the decisions cited from Johnson's Reports and that by Judge Ware in *The Elizabeth and Jane*, is indeed undeniable, as is well stated in the brief for Ward & Co. (and see his opinion in *Pitman* v. *Hooper*, 3 Sumner, 50, 67),— but the proper conclusion from this fact is, not that he dissented, as is above shown that he did, from what those cases are claimed by Ward & Co. to decide, without any reference to them ;— but that he did not regard them as having decided anything of the kind.

11. The action of the Circuit Court in refusing to adopt the doctrine referred to above (8) was taken after consideration of the English decisions above referred to (9), also of the English text writers who have cited or commented upon them, also of such of the American cases as it found applicable. (Opinion, pp. 198–206).

It was taken because to adopt such a doctrine in this case would be to adopt it "for the first time in any of the Courts of the United States" (p. 204).

It was taken because the doctrine was found to violate "the fundamental rule of maritime law that the ship is bound to the cargo, and the cargo to the ship", (p. 204) ; and to involve injustice as applied to this or other similar cases,

(pp. 201, 203, 204); also because the Court could find no just or sufficient reason for treating a case of derelict followed by salvage upon principles differing from those which apply in all other cases of interruption of a voyage by sea peril.

In the result and reasoning of the Circuit Court, the Court of Appeals afterward concurred without dissent. (Opinion, pp. 406–410).

In support of the result thus reached and in opposition to the objections raised against it by Ward & Co. are submitted the considerations contained in the following paragraphs:

12. *Mutual obligations of vessel and cargo.* These ought to be considered, under the circumstances shown, as *revived* by the salvage of vessel and cargo.

As the bark and cargo had been left by the master, so they were found five days later by the salvors. Neither had suffered further injury during the interval, so far as appears. What the master left and what the salvors brought in was not a vessel and a cargo separately, but a vessel with a cargo still laden on board for the voyage (except only the small part jettisoned), and neither so injured that the damage to it would of itself suffice to alter the rights of either party under the contract.

The master's departure from the vessel had led neither party into any change in his situation as regarded the contract. There had been no opportunity for any such change, the vessel's arrival at Boston having brought the first news received that the master had ever been compelled to leave her.

What the master left and what the salvors rescued was therefore a vessel with a cargo laden on board for a voyage, which the master had been prevented from continuing only by the loss of his water supply and the disabling of the vessel, both caused by sea peril, and which the salvage service enabled him to continue without material expense or delay.

Under such circumstances it cannot justly be said that nothing was saved but a damaged vessel and a quantity of timber lately composing her cargo. The obligations of ship and cargo toward each other arising from the original shipment and the subsequent events of the voyage have been saved as well. These include not merely the obligation of cargo toward vessel for pending freight, but also the obligation of cargo incurred two days before the master's departure to contribute for the sacrifice of his masts, rigging and spars, and the obligation to contribute for the jettisoned deck load.

The above rights against cargo or vessel, like the property rights of the respective owners, had been temporarily lost by a common peril, and cannot be excluded from the common benefit conferred by the salvors with any more justice. Like the rights of property, they ought to be considered as regained and revived by the salvage.

Had the master been able to remain on board with his crew, and thus to be brought into Boston on board her by the salvors, no claim could be made that the mutual obligations of vessel and cargo had been destroyed, or that the ordinary rules which apply to them in a port of refuge no longer governed them. The salvors' compensation might have been less, but the difference would have been immaterial and there would have been no real difference in the situation. Had they remained on board, the master and crew could not have navigated the vessel; she would have had to drift as she did until relief arrived. Whether they remained on board or left her, the vessel's safety depended upon the arrival of relief, and under such circumstances there can be no justice in saying that the master, for no other reason than because he left, is necessarily cut off from the benefit he would have secured from the salvage had he remained.

13. *No renunciation by the master.*

(1). It is unjust to describe *the intention of the master and crew* in the terms used by the District Court and insisted upon by Ward & Co.

The master and crew did not leave "without any intention to retake possession", no matter what the future might bring forth. Unless their intention went to that extent, it is unjust to treat it as a renunciation of all their chances of possible relief by salvors.

The master's testimony is that when he left the vessel he "could not say he expected to see the vessel again." (Cross-Int. 85, p. 30.) Of course not, otherwise his abandonment would have been dishonest or without adequate excuse, which no one claims.

Though neither he nor the crew could safely stay longer aboard her, they left the vessel afloat many miles from any shore or shoal and loaded with such a cargo that she could not sink. A possibility remained of her recovery, however small it may have appeared at the time. No one could then tell, under the circumstances, the full extent of the damage which had been inflicted on the vessel. She might or might not be still capable of completing the voyage. Since no deliberate estimate of her chance of recovery or of her condition was possible at the time, and no consideration can be reasonably supposed to have been then given to them, to use language which implies anything like *election* on the master's part in regard to them is unreasonable.

It is the more unreasonable because upon the chance of completing the voyage depended not only the vessel's claim for freight but the interest of the bottomry lender in the freight, and all claims for contribution from cargo and freight for what the master had so recently sacrificed for their benefit.

To infer from the fact that master and crew left the vessel in order to save their lives, that they were without any in-

tention to go back to her should it ever be possible to do so, — is to draw an arbitrary inference entirely opposed to the evidence.

In a case where a vessel after starting on the voyage had returned to her loading port for fear of capture, Chancellor Kent said: "Here was clearly no relinquishment or breaking up of the voyage on the part of the master. He only retired as fast as the impending danger pressed upon him." (*Palmer* v. *Lorillard*, 16 Johns, 348, 357.) The danger from which the master of the Lines retired was no less.

The Court of Appeals has well described the theory that all intention to retake possession of the vessel had been abandoned as a "forced theory of renunciation" (p. 410).

(2) It is unjust also to give no consideration to the immediate and prompt action of the master under his owners' instructions as soon as knowledge of the relief to the vessel and of her actual condition reached them, or to the steps taken by him before any objection from the cargo owner was suggested.

He has a right to have these considered in determining what his intention regarding the voyage was for the purposes of this case, and to claim that they are not to be disregarded or to go for nothing according to the mere pleasure of the cargo owner.

(3) The master's intention when he left the vessel goes no further than to establish what no one denies, viz., that the salvors found her *derelict*, so that they acquired a right to compensation on that basis, and such a possession as was necessary to secure their compensation. No intention on his part to return could under the circumstances have prevented her being treated as derelict so far as the salvors were concerned.

The Georgiana, 1 Lowell, 91, 93.

If the master had been able to remain on board until the salvors' arrival, the compensation to be awarded them might, as has been said, have been somewhat less and they would have obtained no such possession. But neither the fact that she was derelict nor the salvors' possession which resulted, afford any reason for breaking up the voyage, for the reasons below submitted.

14. *The possession of the salvors*, in which the master found vessel and cargo upon his arrival in Boston, affords no reason for holding that any rights in the voyage had been lost.

Ward & Co. contend that the master could maintain no right to proceed until after he had regained possession, that he never did regain possession of the cargo, and that possession of the vessel was only regained from the Court.

The weight given in *The Kathleen*, *supra*, to the argument that possession had vested first in the salvors and next in the Court before it could be restored to the master (4 L. R. A. E. 277, 278, and see also *The Cito*, L. R. 7 P. D. p. 8), appears to have been due in some degree to the theory of English law that title to derelict property vests in the Crown, —a theory which has no application in this country.

Marvin, Wreck and Salvage, § 131.

It cannot be denied that the salvors' possession was for the benefit of the owners of the property saved except only so far as it was necessary to secure the salvage compensation; see above (6). On no other theory are they allowed either compensation or possession.

It must therefore be either not exclusive of possession by the owner, or it must be possession as his representative and agent for every purpose beyond that of securing the salvage compensation.

It has been said in an English decision upon an insurance

policy covering a vessel which had become derelict and afterward been saved: "Desertion of the ship by the crew does not of itself constitute a total loss; and the subsequent taking possession by the salvors was not adverse, but an act done for the benefit of the owners, and therefore did not dispossess them. The custody of the vessel was in the salvors till the salvage was paid; but the legal possession was still in the owners."

Thornely et al. v. *Hebson*, 2 B. & Ald. 513, 519.

And by *Ware*, J., in a decision often cited regarding the rights of salvors of derelict property,—

> "A person undertaking to save derelict goods stands, in relation to the owner, somewhat in the character of a *negotiorum gestor* of the Roman law, that of a voluntary agent who interferes in the affairs of another without mandate or authority, and he is bound to act for the interest of the owner as well as his own."
>
> *The Amethyst*, 2 Ware, 28, 33.

Derelict is the only case in which salvors gain *any* right to possession. Even in cases of derelict they are not entitled to insist upon it under all circumstances.

The Lady Worsley, 2 Spinks, 253, 255.

The master was, in the case at bar, the first person after the salvors to claim possession at Boston. He claimed it for the purpose which had brought him there from Nova Scotia. His right to possession of the vessel (saving the salvors' rights) is undisputed, and to the vessel were attached rights in the cargo referred to above (12). Independently of those rights, he was bailee of the cargo, and no one was then disputing his right to it also.

As to the possession of the Court, when that began, by virtue of her arrest, —

> "The possession of the property by the Court, through its officers, is a possession protective of the interests of all concerned, and not displacing the rights or lien of any party."
>
> *Story*, J., in *The Nathaniel Hooper*, 3 Sumner, 542, 553.

The salvors can claim no greater rights before their libel than the Court acquired after it.

15. *No injustice toward the cargo owner* is involved in the result reached by the Appellate Courts.

Ward & Co. contend that it is unjust as regards them, because they could not, so they assert, have obliged the master to proceed with the voyage from Boston, had they desired and he opposed its continuance.

It is submitted, on the contrary, that on the facts of this case the vessel was *not* released from completing what she had undertaken, and *could* have been made liable in damages to the cargo owner for failure to proceed, even though she could not have been specifically compelled to pay or stipulate for the salvage claim and get under way. The duties of the vessel under such circumstances, as stated below, paragraph 17, are too well settled for dispute.

If released from performance of the contract, it could only have been on the ground that sea peril had excused her failure to perform, which would have been a breach unless so excused. The excuse would have been one which existed under the contract for the benefit of the vessel only, and which therefore she was at liberty to waive or not as she chose.

Once the master had come to Boston, returned on board, and offered to stipulate for vessel and cargo and to proceed; he had waived all benefit of any possible excuse for non-performance by reason of sea peril encountered up to that time.

That after such waiver the cargo-owner must have prevailed over any such defence, in a suit against the vessel for non-performance, cannot be doubted.

Carver, Carriage by Sea, [3d Ed.] § 302, p. 352.
Assicurazioni Generali v. *S. S. Bessie Morris Co.*, L. R. 2 Q. B. (1892) 652, p. 660.

That perils of the seas are *mutually* excepted in this Charter Party is true, but the charterer can derive no further benefit from the expression than is obtained by having it made clear that the same excuse avails him, in case of his failure to provide cargo, as avails the vessel if she fails to carry it safely,—a point open to question in the absence of the word "mutually". (Carver, Carriage by Sea, § 150.) There is nothing in the word which enables either party to use an excuse provided for the benefit of the other, for the purpose of escaping from the contract without the other's consent.

16. *The injustice to the ship owner*, on the other hand, which is involved in sustaining the ruling of the District Court as against that of the Appellate Courts, is clear.

There is no justice in holding that because master and crew have once been driven out of their ship by sea peril, they must lose, at the sole option of the cargo owner, all benefit of any salvage service which may be thereafter performed, so far as regards the pending freight and all other rights which may have accrued in their favor during the voyage.

"The desertion of the ship was an act justified by the necessities of the case", and the subsequent occupation of the ship by the salvors, with all the detention arising therefrom "was but an incident to a common calamity",—as was said in *The Nathaniel Hooper*, *supra*, p. 562. To turn a justifiable act, excused by the terms of the contract, into a weapon which the cargo owner may if he so chooses use for

the purpose of breaking up the voyage and defeating any obligations to which it may have subjected the cargo, is manifestly unjust and contrary to the principles of maritime law which distribute the burdens of common disaster proportionally.

> "A fundamental principle of *maritime law is* that a marine disaster shall not rest, unless by necessary force of peculiar circumstances, on the vessel alone or the cargo alone. Each is compelled to bear its own portion of the loss. This rule is a recognition of the mutual obligations existing between those who embark in a common adventure."
>
> Opinion, Circuit Court, pp. 195, 196.

The foregoing considerations have shown that there was no such "necessary force of peculiar circumstances" in the present case.

17. Unless the circumstance of derelict is to be allowed to constitute the single exception from well established general rules, the master's right to carry forward the cargo, equally with his duty to do so, is too well settled to be questioned, and there is no good reason why they should not apply to this case.

His *rights*, in cases where the voyage has been interrupted by sea peril at a port of refuge, are nowhere better stated than by *Story*, J., in *Jordan* v. *Warren Ins. Co.*, 1 Story, 342, 354:

> "The master has a right to carry on the cargo to the port of destination; and if his ship be capable, either then, or within a reasonable time, of carrying the cargo to the port of destination, there is no ground to say, that he is not entitled to earn a full freight; and the shippers of the cargo cannot insist upon changing the original contract *in invitum*, and cut him off from all freight or dismiss him with a *pro rata* freight."

His *duties* in similar cases are correlative. He is bound to complete the voyage, and is not allowed to abandon it, unless the effect of the excepted peril has made continuance either physically impossible or so clearly unreasonable as to be impossible in a business point of view.

Assicurazioni Generali v. *S. S. Bessie Morris Co.*, L. R. 2 Q. B. (1892) 652.

The above rights and duties extend even to transhipment and forwarding by another vessel.

"By (the maritime) law, as understood in England, the master, from the necessity of the case, had the right, and by our law, the duty, in case of disaster to his ship, to transship the goods and send them on by another vessel, if one could be had." *Gray*, J., in —

Harrison v. *Fortlage*, 161 U. S. 57, 65, citing *The Maggie Hammond*, 9 Wall. 435, 458; 3 Kent Com. 212.

18. *The salvage and general average claims* which had accrued upon the cargo do not at all impair the master's right to complete the voyage according to the ordinary rules.

It is not true, as asserted by Ward & Co., that they had deprived the voyage of its character "as an ordinary transaction of commerce". Practically the whole original cargo was still on board as it had been shipped, and not being perishable, it was capable of being delivered *in specie*.

Diminution in the value of the cargo to the owner, so long as it can be delivered *in specie*, affords no reason for breaking up the voyage.

"Nothing is better founded in the law on this subject, than that the shippers are bound to pay the full freight for the voyage, if the cargo is carried to its port of destination, and specifically remains, notwithstanding at its

arrival it is, by reason of sea damage utterly ruined and worthless. . . . It is as clear, that after the shipment of the cargo on the voyage the shippers have no right to demand it at any intermediate port, short of the port of destination, without payment of the full freight for the voyage, whether the cargo arrive in a damaged, or in an undamaged state," etc.

Story, J., in *Jordan* v. *Warren Ins. Co.*, 1 Story, 342, 353.

The salvage and general average liens on the cargo had accrued by reason of sea peril, against which the vessel had never undertaken to protect it. Doubtless its value had been diminished by them. The diminution, however, had not been so great as Ward & Co. claim, (though even if it had been it would make no difference).

The Commissioner has found that the value of the cargo at its destination, after all deductions for jettison and depreciation, would have been about $11,000, and that about $5500 would remain after paying full freight, (p. 247). This would be enough to pay the salvage and general average claims (p. 251) and still leave a substantial balance.

That the cargo did not realize at the forced sale in Boston enough to pay salvage and general average is immaterial. It was never suited to that market nor intended to be sold there. See the evidence in the Record of —

West, pp. 76, 77.
Hunt, p. 86, Cr. Ints. 36–38.
Ellicott, pp. 89, 90, Cr. Ints. 18–20.
Madden, pp. 103-107, Ints. 12–17, Cr. Ints. 28–31, 66.
Darrach, pp. 327, 328, Cr. Int. 103.

19. The existence in this Charter Party of the *"cesser clause"* made the vessel's rights in the voyage, under the

circumstances existing at Boston, of especial importance to her and to all parties who had acquired interests in the freight.

Individual liability of Ward & Co. as parties to the Charter Party was by that clause to "cease upon delivery of cargo *to the vessel*". *The vessel's security* for "*all* freight, dead freight and demurrage" was thereafter to consist solely in her lien upon the cargo. See the Charter Party (Rec. p. 36).

Ward & Co., for whose benefit this clause had been inserted, were the last parties entitled to consideration in any question affecting the value of the lien to which the vessel's interests in the voyage had then been confined. To make the continuance or termination of the voyage dependent upon their option alone is peculiarly inequitable.

20. *Denial of salvors' rights involved in the sale.*

The voyage not having been broken up, as above shown, the only terms upon which Ward & Co. could lawfully have been allowed to take the cargo at Boston would have been,—

(1) Payment of the full freight for the voyage.

3 Kent, 228, and n. 2.
Jordan v. *Warren Ins. Co.*, cited above.

The amount of this has been ascertained by the Commissioner to be $5609.25. (Rec. p. 251). The salvage claim upon freight would then have been secured,— and the General Average and bottomry claims upon freight as well.

(2) Payment of or security for the salvage claims upon the cargo, or at least upon any excess in value of the cargo above the full freight paid.

(3) Payment of or security for the general average claim upon cargo ought also to have been required, but with this the Salvors are not concerned.

For the purpose of the salvage claim upon it the cargo could not in justice have been treated otherwise than as a

cargo to go forward and be delivered on its voyage; because the master stood ready to give stipulations for it upon that basis, and because, if the voyage had continued, the salvage, like the general average claims upon it, would have been settled according to its value at the port of destination. This value as shown above (18) would have been about $5500 more than the full freight.

But instead of the award against freight and cargo which they ought to have had as above, based on a total value for those interests of more than $11,000; — the District Court treated freight and cargo together in its award, as amounting to only $910.74, the net proceeds of the sale of the cargo which it had erroneously ordered.

See above, Statement of Facts, pp. 8, 9, and the Decree itself, Record, pp. 71, 72.

It is no doubt true that had the salvors brought to Boston a vessel and cargo to which no one made any claim at all, or a vessel and cargo incapable of continuing their voyage, they would have had to be satisfied with salvage upon what was realized at Boston by a sale under their libel. But the facts being, as above shown, that they saved not only vessel and cargo but a *voyage*, which the interposition of the cargo owner only defeated, they were entitled to salvage awarded according to the actual facts.

21. *Decree of the District Court also erroneous in other respects.* It may be pointed out here that if *pro rata* freight were due in this case (Opinion of District Court, pp. 73, 74, Final Decree pp. 71, 72) and to the amount of $1450, as decreed; the salvors were surely entitled to 45% upon all of it, but all they got was 45% upon $910.74, the proceeds of cargo appropriated to pay this "*pro rata* freight". A further decree against Ward & Co. for 45% of the remaining $539.26 was clearly required in favor of the salvors against Ward & Co. in order to do justice even upon this theory.

II.

The Appellate Courts were right in correcting the error made by the District Court in selling the cargo, by decrees against Ward & Co. personally for such amount of freight as was found necessary to satisfy the salvage and other claims upon freight.

1. The Decrees sanctioned by the Appellate Courts were framed for the purpose of subjecting Ward & Co., as the parties before the Court claiming and representing the cargo, to the same liabilities as ought to have been imposed upon them by the District Court, if they were to be allowed to take the cargo or direct its disposition at Boston. What those liabilities were has been shown above.

The salvors are interested in maintaining these Decrees so far as they go in obliging Ward & Co. to pay the pending freight and in appropriating a suitable portion thereof to the payment of the salvage compensation due from freight.

[That the Decrees should have called for a larger payment on account of pending freight and should have awarded the salvors a larger share is, however, contended by the salvors, as below argued pp. 53–66].

2. Ward & Co. contend that no decree could properly be made against them personally.

The main reliance in support of this contention appears to be the alleged effect of the sale of cargo ordered by the District Court. It is claimed on various grounds that this was such a sale as binds all parties interested in the cargo and limits all claims in respect of it to the proceeds of the sale.

It is below argued on the salvors' behalf that none of the grounds alleged by Ward & Co. for giving to the sale referred to the effect claimed are sound; also that the Record shows the sale to have been irregular and made in the interest of Ward & Co. alone.

3. The sale is claimed to have been *within Admiralty Rule 10.* To bring it within that Rule the cargo must have been "perishable, or liable to deterioration, decay or injury" by detention in custody, etc. It has already been pointed out that the cargo was not "perishable". It was never claimed or shown to have been "liable to deterioration, decay or injury". The sale was moved for and ordered upon other and different grounds, as below stated.

4. The sale is claimed to have been a sale in the discretion of the Court, ordered for the *common benefit of all concerned.*

The Record shows, on the contrary, that the sale was moved for by Ward & Co. only, and opposed by every other party there before the Court, viz.: the salvors who had libelled the cargo, and the master who had claimed it in their suit, offering to give stipulations for it and carry it on.

The grounds upon which the motion for sale was based, the evidence upon which it was heard, and the reasons upon which it was granted also fully appear in the Record. They are all wholly inconsistent with the theory that the sale was for the common benefit. The District Judge's certificate (Rec. p. 78) shows that the hearing on the motion for sale was also a hearing on Ward & Co.'s libel for possession and on the master's counter application to stipulate for the cargo. This application was dismissed simultaneously with the granting of the motion for sale (Rec. p. 13).

Grounds upon which Ward & Co.'s motion was based. It was filed October 18, 1889. (Rec. p. 13). On that date Ward & Co. were on record, not only in their adverse claim filed in the salvage suit September 27 (Rec. pp. 10, 11), but also in their Libel for possession of the cargo filed also on October 18 (Rec. p. 119) as demanding the cargo without payment of freight on the ground that the voyage had been broken up. Their motion is expressly stated to be made in their capacity as such claimants.

Evidence on which their motion was heard. This has been reported by the District Judge. (Rec. pp. 76–78). It contains nothing tending to support any contention that the value of the cargo was being diminished or that the interest of all concerned required its sale. It relates wholly to the claim that the voyage had been abandoned.

Grounds upon which the motion was granted. These are all recited in the order of the District Judge. (Rec. pp. 73, 74). There is no reference whatever to diminution of the cargo's value or the interest of all concerned. Ward & Co.'s application is granted and upon the grounds urged by them alone.

Opposition of all other parties. The District Judge's report shows that they were represented at the hearing on the above evidence for the purpose of opposing the granting of the motion. And the Record shows that they claimed appeals from all the District Court's interlocutory orders, and that their appeals were allowed. (Appeal by salvors, pp. 72, 73. Appeal by master, p. 73). See also the motions orally made November 27 to restrain the sale unless stipulations should be furnished. (Rec. p. 23, pp. 138, 139). These motions were later inserted in writing, in order to complete the Record.

Ward & Co. dispute the statement in the Opinion of the Circuit Court (p. 177), "Neither did the salvors apply for a sale", *i. e.*, of the cargo; on the ground that the salvage Libel contains in its prayer for process the usual request that vessel and cargo might be sold. This of course referred to a sale on final decree, in case no claimant should appear or stipulate. It did not preclude the salvors from opposing, as they did, an interlocutory sale after rival claimants had appeared, one of whom desired to stipulate, and the other was urging the sale for the expressed purpose of withdrawing freight from consideration as an interest subject to sal-

vage. It cannot, therefore, be used to assist the claim that a sale which they thus opposed and which was destructive of their interests, was for the common benefit.

5. It is urged by Ward & Co. that Admiralty Courts have a well established power to order a sale upon the happening of a marine disaster in order to settle questions of necessity for selling property involved and to relieve those in charge of it from such responsibility as would be incurred by selling without the sanction of a decree.

This of course is not denied, nor is it denied that under proper circumstances parties other than the master may ask the Court to exercise such power.

It is equally true, however, that sales so made do not conclude parties who oppose or have never consented to them, and that against such parties they are not upheld if sufficient cause be shown. See among the cases cited by Ward & Co.

The Fanny v. *Elmira*, Edw. Adm. 117.

And see also,

China Mut. Ins. Co. v. *Force et al.*, 142 N.Y. 90.

But nothing can be clearer, in view of the circumstances under which this sale was made (see the preceding paragraph), than that the Court was not acting upon any such theory or undertaking to exercise any such power. There was no question of selling property in the owner's absence, the owner and all other parties claiming rights in the cargo were before the Court, and the sale was asked for and ordered upon wholly different grounds, as has been shown above.

6. It is urged by Ward & Co. that had the cargo been detained under arrest since 1889, the allegations contained in their motion for sale that the charges of custody were diminishing its value "would have been amply justified".

The salvors do not, of course, contend that the cargo should have been detained in custody, but do claim that it

should have been delivered to the master upon the stipulations which he stood ready to give; or, if that was to be refused, that Ward & Co., before being allowed to take or sell the cargo at Boston, should have been required to satisfy or give adequate security for the master's and their own claims upon it, *i.e.*, as above argued, the freight pending and the salvage claim upon the cargo valued as a cargo to go forward on its voyage — not to mention the master's claim in General Average.

7. It is urged by Ward & Co. that in view of the conflicting claims by master and cargo owner, the District Court might have ordered the cargo delivered to them upon their stipulation, for its value at Boston, instead of ordering it sold at their request,— that the result, so far as the claims upon the cargo were concerned, would have been the same as that effected by the sale, and that no redress against Ward & Co. would have been obtainable on appeal.

But it cannot be properly assumed that the result of delivery upon stipulations would have been the same as the result of the sale. The amount for which stipulations should be given would have been determined by the Court, and there is no warrant for the assumption that a cargo invoiced at $3,460.77 (Rec. p. 246), and worth at its port of destination $11,781.36, or $5,506.91 after deducting full freight and depreciation from sea damage (Rec. p. 247), would have been delivered upon stipulation for $910.74 only, the amount realized by the sale. Certainly no such result could have been reached without hearing all parties, and from an erroneous ruling or decision there would have been an appeal.

And since Ward & Co. could lawfully have been allowed to take the cargo from the vessel at Boston only upon payment of the full freight for the voyage ($5,609.25, see above, p. 41, par. 20), any delivery of it to them upon stipulations not securing that amount at least would have been in violation of the rights of the salvors and the master,

8. It is urged by Ward & Co. that the District Court had full *discretion*, even if the contract of affreightment was in force at Boston, either to deliver the cargo to the master upon his stipulation to pay the claims upon it or to refuse such delivery; and that it ought to have refused under the circumstances because it "would be grossly inequitable and unjust to those interested in the cargo" to permit the master to carry the cargo forward on the voyage.

The discretion of the Court, however, could never have warranted an interference with any rights acquired under an existing contract. And if any exercise of discretion were permissible, the Court would be as much bound to protect the rights of one party as of another. That the events of the voyage had diminished the value of the interests of the cargo owner would be no reason at all for destroying the rights of the vessel and of all other parties whose rights depended upon the earning of freight.

The insurer of the cargo (for whose benefit the application would have been made) could hardly have expected the Court to disregard for its sole benefit the interests of every other party.

9. *The proceedings regarding the sale were irregular.* None of the statements contained in Ward & Co.'s motion for sale were sworn to. No answer to them was ever filed, nor any answer to the allegations in Ward & Co.'s original claim to the cargo, asserting that the voyage had been broken up, out of place and irregular as these were in such a document. The motion for sale was heard October 18 and the decision ordering the sale rendered November 16, before any answer had been filed to Ward & Co.'s libel for possession, or by Ward and Co. to the salvors' libel. The master's answer to Ward & Co.'s libel for possession was not filed until November 29. (Rec. p. 122). Ward & Co. have never filed any answer to the salvage libel, although they

claimed the property libelled; the only answer filed was by the master. (Rec. p. 21).

The statements in the opinion of the Circuit Court that the order for sale was made without plea or proof or judicial determination of an issue (p. 179) are fully justified.

10. The sale was made *in the interest of Ward & Co. alone.*

Because it was ordered, as above shown, upon their sole application, on grounds involving the approval by the District Court of their claim to be solely entitled to direct the disposal of the cargo, and of their claim that it was not subject to any freight — the sale can only be regarded as an equivalent or substitute for the delivery of the cargo to them which Ward & Co. had asked for, made because they, being found entitled to such delivery, elected to have it sold.

That this or some such theory was the theory of the District Court also appears from the award of *pro rata* freight made against the proceeds of sale in the subsequent Final Decree (Rec. pp. 71, 72), indicating that it regarded Ward & Co. as having *voluntarily accepted* the cargo at Boston.

Upon no other theory than that the sale was in Ward & Co.'s interest alone can it be justified at all, as declared by the Circuit Court. (Opinion, p. 178).

11. It is important to notice here, as bearing upon the position of Ward & Co. before the Circuit Court, the following proceedings in the District Court *after* Ward & Co. had obtained the sale of the cargo as above:

(1) The Salvors' petition filed November 27 (Rec. pp. 16, 17), reciting the facts regarding the sale, alleging that Ward & Co. were still bound to pay freight to the amount of $5,600, upon which salvage was due the petitioners, and asking that Ward & Co. be ordered to show cause why such freight should not be paid into Court to answer the salvage claim.

(2) Summons to show cause issued on this petition served on Ward & Co.'s proctors November 29, (Rec, p. 18).

(3) Ward & Co.'s appearance in obedience to the summons by their answer to the petition filed December 9 (Rec. pp. 18–21) alleging cause why no such payment should be made, and praying that the petition be dismissed.

(4) The virtual dismissal of the petition by the Final Decree entered May 13, 1891, confining the award of salvage so far as cargo and freight were concerned to the net proceeds of the sale; and the appeal of the salvors therefrom. (Rec. pp. 71, 72.)

(5) Also the Libel by the master of the vessel filed November 27 (Rec. pp. 133–137) against Ward & Co. and served, like the above summons, to show cause, upon their Proctors, November 29. The master claimed of Ward & Co. freight to the amount of $5,600 and a contribution from the cargo in general average. This Libel the Circuit Court has treated as a cross suit to Ward & Co.'s Libel for possession of the cargo, and therefore as making Ward & Co. parties to the cause answerable for any liabilities ascertained to be due from cargo.

12. Ward & Co.'s position before the Circuit Court was therefore this: As claimants of the cargo and parties to the proceedings they had brought about its sale in their own interest instead of allowing it to go forward on the voyage. They had also denied the right of the salvors and of the master to have the freight paid into Court after the sale, and had resisted the master's claim for contribution in general average.

All this they had succeeded in doing because the District Court had erroneously decided that all the master's right to a continuance of the voyage had been lost.

The Circuit Court having reversed that decision, Ward & Co. stood before that Court as the parties who had intervened to resist the lawful claims of the salvors and the master, and had assumed the responsibility for the property burdened with those claims.

They had displaced and destroyed in value (beyond the inconsiderable amount of proceeds) liens to which the salvors and the master were justly entitled — including the lien for freight which in the Charter Party they had expressly guaranteed — as a substitute for their personal liability (see pp. 40, 41, par. 19). As stated by the Circuit Court, pp. 197, 198 — they accepted the cargo from the ship and thus substituted their personal obligation for the lien which, until unladen, the ship had on the cargo.

Having them before it, therefore, as parties to the cause, not only asserting rights of their own but controverting rights asserted by other parties that Court had power to enter decrees against them, as held by that Court (Opinion pp. 189–195), and by the Court of Appeals. (Opinion, pp. 416–418).

The decrees entered were such only as were found necessary to subject them to the liabilities to which they should have been subjected by the District Court and to secure to the other parties concerned what they had lost by the action of the Court below.

Bank of U. S. v. *Bank of Washington*, 6 Peters, 8, 17.
N. W. Fuel Co. v. *Brock*, 139 U. S. 216.

13. Ward & Co. contend that if the District Court's order of sale was erroneous, the "obvious remedy" of the salvor and ship owner was by *writ of prohibition* and not by appeal, and that they cannot be held on appeal because such "obvious remedy" was not sought at the time.

But "a writ of prohibition will be issued only in case of a want of jurisdiction either of the parties or of the subject matter of the proceeding".

In re Fassett, 142 U.S. 479, 486.
In re Morrison, 147 U.S. 14, 36.

Nor, even if there is question as to the jurisdiction of the District Court, is the writ always granted as matter of right.

In re N. Y., etc., S. S. Co., 155 U. S. 523, 531.
In re Alix, 166 U. S. 136.

No case can be found in which this Court has issued such a writ to a District Court to restrain the execution of an order of sale of property properly in its custody and therefore subject to its decrees.

(ARGUMENT ON ERRORS ASSIGNED BY SALVORS TO DECREE OF COURT OF APPEALS.)

III.

The Court erred in holding that the freight liable to pay salvage was not the gross freight pending but was only net freight.

The Circuit Court has admitted in its Opinion, (Rec. pp. 207, 208), that "there are expressions in various text-books and decisions, leading to the impression that where the voyage has been broken up by the cargo owner after it has commenced", the ship owner's right to gross freight,— *i. e.*, the entire stipulated freight according to the Charter Party,— is established.

Notwithstanding this, the Court said: "We do not understand, however, that this has been so expressly determined", (Rec. p. 208); and expressly instructed the Commissioner to allow only net freight as the basis of the decree against Ward & Co. (Rec. pp. 207–209).

Upon confirmation of the Commissioner's Report the Court gave further reasons for making net freight instead of gross freight the basis of its decree; these reasons being drawn from "modern rules" for damages for breach of contract. (*Opinion*, Rec. p. 357).

The Court of Appeals came to the same result, treating the question in the same manner,— as governed by the rules applying to damages for breach of contract, and citing, *Watts* v. *Camors*, 115 U. S. 353; *The Gazelle and Cargo*, 128 U. S. 474, 487. (Opinion, Rec. pp. 410–413).

In regard to the above two cases cited by the Court of Appeals, it is submitted that in neither of them did the vessel enter upon the voyage for which she had been chartered. In *Watts* v. *Camors* no cargo was ever loaded on board. In cases of this character the rules applying to questions

regarding the freight are wholly different from those which apply when the cargo has been shipped, the voyage has been partly performed and is then interrupted by disaster.

The Tornado, 108 U. S. 342, 347–350.
Bailey et al. v. *Damon et al.*, 3 Gray, 92, 94, 95.

We maintain that the uniform rule of law, in cases like the present, in which the voyage has been interrupted at an intermediate port and the ship owner has been prevented from completing the voyage by an act or default of the charterer or cargo owner, has always been to allow the *gross* freight to the ship owner.

In *Palmer et al.* v. *Lorillard et al.*, 16 Johns. 348, p. 355, *Chancellor Kent* said: "It is well understood in the English law, and our own, that it is not in the power of one only of the parties to rescind a contract. Being mutually binding, it requires mutual consent to dissolve it. The one party had no right to tender the cargo, nor the other to demand it, until the contract had been fulfilled, unless, indeed, the demand was accompanied with the offer of the entire freight"; and the Court further said (p. 356), that the cargo owners could not deprive the ship owners of the right to carry the cargo to the port of destination without the ship owners' consent, "or without tendering to them the stipulated compensation".

In *Post et al.* v. *Robertson*, 1 Johns. 24, p. 30, *Livingston*, J., said: "If the master offer to repair his vessel, and to hire another, and the merchant insists upon having his goods, then, and perhaps, in that case only, should freight, and a full freight be allowed."

In *The Nathaniel Hooper*, 3 Sumner, 542, p. 555, *Story*, J., said that if, at an intermediate port, the shipper "voluntarily insists upon receiving, and does receive his goods, the carrier ship being ready and able to carry them to their des-

tination, there can be no doubt that full freight is due for the whole voyage".

The cases in which the above rule has been stated and followed are very numerous; the following are referred to:

Lutwidge and Another v. *Gray and Others*, Abbott (5th. Ed.) 307, (13th Ed.), 591; Maclachlan (3d. Ed.), 479.

Luke v. *Lyde*, 2 Burr, 887.

["WHOLE freight of the *full* voyage," *Lord Mansfield.*]

Hunter v. *Prinsep*, 10 East. 378, 394.
Herbert v. *Hallet*, 2 Johns. Cases, 93, 97, 98.
Bork v. *Norton*, 2 McLean, 422, 426, 427.
Tindall v. *Taylor*, 4 E. & B. 219, 226.
Ellis v. *Willard*, 9 N. Y. 529, 532, 535.
Bailey et al. v. *Damon et al.*, 3 Gray, 92, 94.
Cargo ex Galam, Br. & Lush, 167, 180, 181.
The Soblomsten, L. R. 1 A. & E. 293, 297.
The Maggie Hammond, 9 Wall. 435, 458.
The Tornado, 108 U. S. 342, 347–350.

In the above cases the controversy was between ship owner and cargo owner.

In the following cases the question was whether insured freight had, or had not, been lost:

Griswold v. *N. Y. Ins. Co.*, 1 Johns. 205, 212.
S. C., 3 Johns., 321, 327.
Clark v. *Mass. F. & M. Ins. Co.*, 2 Pick. 104, 110.
McGaw v. *Ocean Ins. Co.*, 23 Pick. 405, 410, 411.
Jordan v. *Warren Ins. Co.*, 1 Story, 342, 353–356.
Allen v. *Mercantile Marine Ins. Co.*, 44 N.Y. 437, 444.

See also,

Phillips on Insurance, Sect. 1633.
Carver's Carriage by Sea [3d Ed.], Sect. 554.
3 Kent's Commentaries [12th Ed.], 224, 228, and n. 2.

No suggestion is found, in any of the above cases or text-books, that any deductions should be made from the gross freight for the cost of earning it; nor, we submit, has it ever been so decided before this case, in any case in which the ship has taken her cargo on board and has actually performed part of the voyage.

We submit that the Circuit Court and the Court of Appeals are in error upon this point in that they fail to recognize that (in the absence of any wrongful act of the ship owner in relation to the cargo) the cargo owner can only get lawful possession of the cargo at an intermediate port *by the consent of the master upon payment of the gross freight.* This is recognized both by counsel and by the Court (BRETT, L. J.) in the report of *The Cito*, 4 Asp. M. C. 468. See, too, *Palmer* v. *Lorillard*, 16 Johns. p. 355. In fact, Parsons (1 Ship & Adm. p. 231, note 3) expresses doubt whether the master is *obliged* to give up the goods at the intermediate port, even on *tender of full freight.*

If at a port of refuge, observance of the rules of law applicable will not permit the cargo owner to take his cargo from the vessel without paying a full freight, a cargo owner who gets his cargo in violation of these rules, as was the case here, should not be put in a better position. Having said of the cargo owner in this case that "he must stand the same consequences as though he had accomplished immediately by his own act what he succeeds in accomplishing mediately by himself setting the Court in motion" (*Opinion*, C. C., Rec. p. 181), and having held that action of the Court unjustifiable (pp. 177, 178), it is certainly most unjust and inequitable, that the cargo owner who wrongfully induced the Court to act for him in forcing the ship master to surrender the cargo at the intermediate port should be permitted by the Court to occupy a better position in regard to the obligation to pay freight, than the cargo owner who gets pos-

session of his cargo by the only lawful method, viz., by payment of gross freight.

Also, the Court of Appeals said of the cargo owners, (*Opinion*, C. C. A., Rec. p. 418): "Their interference, even under the regular forms of maritime procedure, was unwarrantable and inexcusable under the circumstances. Such interference operated to interrupt a voyage which should and would otherwise have been completed". But it justified its refusal to allow gross freight by reference to "equitable principles" of damages. (*Opinion*, Rec. 410–413). Surely, equitable principles ought not to be applied on behalf of cargo owners whose conduct can fairly be characterized as above to override well settled principles of the maritime law and of the common law.

The cargo owner demands his cargo at the intermediate port because he finds it, on the whole, for his own interest to take it at that place rather than to run the risks of further delay on the voyage, or, perhaps, because he can sell it then and there to better advantage. (*Palmer et al.* v. *Lorillard et al.*, 16 Johns. p. 364; *The Nathaniel Hooper*, 3 Sumner, p. 555.)

The language of the cases cited above, (p. 55), and of the numerous other cases on the subject, mean, and can mean, but one thing, and that the same thing, by the use of the words "full freight", "gross freight", "entire freight" "freight for the entire voyage", "the stipulated compensation", (16 Johns. 356), viz., *all* of the freight which the cargo owner contracted in the beginning to pay for the performance of the whole voyage. The cargo owner has properly no concern with the expenses of earning the gross freight. The ship owner is entitled to the gross freight to reimburse him for the money which he has already expended to enable him to perform the voyage, — (usually, at an intermediate port, the much greater part of all of the necessary expenses), —and to the balance then remaining, first to insure him

V.

The Court erred in not awarding to the salvors a greater proportion of the value of the vessel, of the freight pending and of the cargo (whatever the value thereof) as salvage compensation. The proportion awarded is greatly below that usually allowed in cases of derelict.

Elements of the salvage service rendered.

1. *The salving vessel and her crew.*

The salving vessel was the pilot-boat Edward E. Barrett, of New York, a schooner of 65 tons, about $17,500 value; owned by Captain William W. Black, master and original libellant, and by five other New York pilots; manned, at the time by two of her owners, four boys, boat keeper and cook. (*Hughes*, Rec. pp. 53–56, Ints. 1–19, 43, 44).

2. *Time when, and locality in which, the Lines was found.*

The Barrett fell in with the Lines, at noon, on Monday, September 16, 1889, in latitude 40° 45′ north, longitude, 68° 40′ west,—about 75 miles southeasterly of Nantucket. (Rec. p. 54, Ints. 20–25).

3. *Weather, and condition of Lines at the time.*

The wind was about S. W., when the Barrett found the Lines, and the weather was squally, dirty and rainy.

The Lines had no one on board of her; her foremast, main mast and mizzen topmast were gone, the mizzen mast head was started, two of the hatches were off, the pumps were not working well, she had some water in the hold and was about 2½ feet by the head. (Rec. p. 54, Ints. 23, 27–34; p. 96, Cross-Ints. 96–103).

4. *Dangers to the salved property.*

The Lines had been abandoned, 5 days earlier, in latitude 38° 37′ north, longitude 67° 24′ west, (*Andreasen*, Rec. p.

26, Ints. 29, 30, 33),—about 200 miles southeasterly of Nantucket; so that, when found by the salvors, she had drifted about 125 miles. She was in the track of steamships passing between New York and Europe, in great danger of being run into by them, was drifting to the northward and eastward and in danger of fetching up on Georges Bank. The locality is one where towboats never go unless specially sent. (Rec. pp. 55–57, Ints. 35–40, 59).

Soon after the Lines was towed into Boston by the Barrett, (as hereinafter stated), a gale from N. W. set in, (p. 62, below).

5. *Services rendered by the salvors.*

One of the pilots went on board of the Lines with one of his crew, hauled in two hawsers that were hanging over her bow, and made several attempts to get hawsers from her to the Barrett, which failed because of a choppy sea. Darkness then came on, and hanging a light upon her, they returned to the Barrett, and lay by for the night. At about 5 o'clock the next morning, (Tuesday, September 17), they went on board of her again, passed hawsers between the vessels and began to tow. The Lines had drifted 10 miles N. E., in the night. (Rec. pp. 55, 56, Ints. 41–48).

The pilots of the Barrett first attempted to tow the Lines to the westward; but finding, at about noon, that they were so far to the northward that they would be unable to reach New York, they towed her up the South Channel, and until between 9 and 10 o'clock, on Wednesday morning, September 19,—at which time they had towed her about 90 miles, and had reached a position near Highland Light, Cape Cod, in thick fog. They then met a tow boat and employed her to tow the Lines to Boston for $400. The Barrett also came to Boston with the Lines, arriving at 2 o'clock on Thursday morning, September 19, and lay alongside of her. (Rec. pp. 56–58, 59, Ints. 49–67).

The wind hauled to northwestward when the towboat was employed,— which would have rendered it impossible for the Barrett to tow the Lines either into Provincetown, or Boston, — (the only suitable harbors within reach); and soon after arrival in Boston, a gale from the N. W. set in, as stated in paragraph 4, above. (Rec. pp. 62–64, Int. 124; Cross-Ints. 130–136, 144).

6. *Dangers and expenses of the salvors in performing the service.*

During the towage the Barrett was in danger of being run into at any time, either by the Lines or by other vessels, as it was thick fog part of the time. (Rec. p. 58, Int. 68).

The expenses incurred by the salvors were: $400. paid to the towboat; $80. for wharfage and $40. for watchman, to care for the Lines and cargo in Boston; $10. or $12. damage to a hawser while towing; — in all about $530. In addition to these expenses, the Barrett was necessarily absent from her pilotage work, while taking the Lines into port, for from 8 to 12 days, at a loss of from $75. to $100. per day for her use in pilotage. (Rec. p. 58, Ints. 66, 71–77; pp. 61–64, Cross-Ints. 115–120; Ints. 124–126; Cross-Ints. 130–135.)

It is apparent from the above testimony,— which is entirely uncontradicted,— that the services rendered by the Barrett to the derelict Lines and to her cargo and freight were highly meritorious, and that the peril to them was extreme. Even if the Lines escaped drifting upon Georges Bank, she was in imminent danger of destruction by collision with trans-Atlantic steamships. She was out of the range of tow-boats; and the salvors performed their service with difficulty and danger, and with a small crew, solely by means of their small pilot-schooner, for the Lines, herself, had no means of propulsion.

The time occupied by actual services to the Lines, until the arrival in Boston, was more than 2½ days.

7. *The decrees for the salvors.*

The District Court awarded to Black, $1755. salvage; but $350. of it was awarded as expenses, leaving the net award $1405. and costs taxed at $313.06; and the gross award of $1755. was apportioned,—$1249.32 against the vessel, and $505.68 against the net proceeds of the sale of her cargo, ($910.74), applied by the Court as *pro rata* freight. And no award was made against cargo, as cargo had now disappeared as the result of such application of the proceeds by the Court. (*Decree*, Rec. pp. 70–72; and see pp. 8, 9, above.)

This was, substantially, an award of slightly less than 45 per cent of the property saved, as represented in the court, without full reimbursement of actual expenses incurred by the salvors in rendering the service.

If the actual disbursements are all deducted from this award of $1755., the net award would be, at most, $1225., which is less than 39 per cent of the sum against which the award was made; and if consideration is had of the loss to the owners of the use of the Barrett while performing the service, the award is reduced by from $600. to $1200. (p. 62, above), leaving little or nothing to the salvors for their labors.

The Circuit Court followed the District Court in adopting 45 per cent of the property saved, as the proper proportion to be awarded the salvors. It awarded to the salvors the same *amounts*, against vessel and cargo, as had been decreed by the District Court. It, however, ordered that the amount stated in the decree of the District Court to be apportioned against *freight*, should now be apportioned against *cargo;* and it, further, made a decree against Ward & Co. for the additional amount of 45 per cent of the freight ordered to be paid by them. (*Opinion*, Rec. pp. 189, 206, 207, 209).

This resulted in an additional sum of $996.33 being awarded to the salvors, to be paid by Ward & Co. out of the amount awarded against them for freight and general average. (Rec. *Report of Commissioner*, p. 251; *Opinion*, pp. 358, 359;

Decree, pp. 367–369.) But no further allowance for the actual expenses of the salvors was ordered. Deducting such actual expenses, the total award of the Circuit Court is reduced to $2221.33, which is slightly more than 41 per cent of the sum against which the award is made, and, again, without any allowance for the loss above referred to of the use of the Barrett.

The Court of Appeals affirmed the decree of the Circuit Court, excepting that (in consequence of rehearing) it directed (pp. 459–461, 463, 464) a modification of that decree, adding thereby the sum of $686.44 (45 per cent of $1525.43), with interest from the date of the Commissioner's Report, also to be paid by Ward & Co.

The final decree in favor of the salvors thus became, (exclusive of interest and costs):

Against the Eliza Lines, for services and expenses,		$1,249.32
Against the cargo of the Lines (represented by $910.74, proceeds of sale, in court), for services and expenses,		505.68
Against Ward & Co., for salvage of freight,	$996.33	
(added on rehearing),	686.44	
		1,682.77
		$3,437.77

But deducting the actual expenses of the salvors, the award of the Court of Appeals is reduced to $2,907.77, slightly in excess of 42 per cent of the total amount against which the award is made, and, again, without any allowance for the loss of use of the Barrett.

It is here claimed on behalf of the salvors that 42 per cent is much below the proportion usually allowed for salvage in cases of derelict.

Peisch v. *Ware*, 4 Cranch, 347, 365, 366. (50 per cent of gross value of goods awarded.)

Sprague et al. v. *140 Barrels of Flour*, 2 Story, 195. (50 per cent of gross proceeds awarded, with costs and expenses to be paid out of the other half.)

210 Barrels of Oil, 1 Sprague, 91. (5/6 of value awarded.)

The Charles Henry, 1 Ben. 8. (50 per cent of vessel and cargo awarded.)

The Zealand, 1 Low. 1. (The whole awarded upon property of small value.)

Cargo from Wreck of Bark Edwards, 12 Fed. Rep. 508. (70 per cent of net proceeds awarded after payment of all costs and expenses.)

The Lahaina, 19 Fed. Rep. 923. (The whole proceeds of cargo, and 50 per cent of net proceeds of vessel awarded, in a less meritorious case; property not even derelict.)

The Calvin S. Edwards, 46 Fed. Rep. 815. (45 per cent awarded for less services, and where there were no additional expenses.)

The Agnes Manning, 59 Fed. Rep. 481. (50 per cent awarded plus all expenses.)

The L. W. Perry, 71 Fed. Rep. 745. (75 per cent of vessel and cargo awarded, after deducting expenses and costs. Services much less than in case at bar.)

Counsel for Ward & Co. admit, in their brief in support of their petition for *certiorari* (p. 38): "According to all precedent, salvors of a cargo, derelict in the circumstances in which this was ~~one~~ one, would be awarded fifty per cent of its value".

That salvage should have been awarded upon the gross freight, rather than the net freight, has been discussed at pp.

53–57 above; that salvage should have been awarded upon the value of the cargo for purpose of delivery, rather than upon the net amount of the proceeds of its sale at Boston has been discussed, pp. 58, 59, above.

The hardship to the salvors arising from the inadequacy of the award is intensified by the fact that the Circuit Court allowed them no interest whatever upon the salvage award against vessel, or cargo; not even upon such portion of the award as was stated to be for expenses incurred now more than fifteen years ago, and allowed them interest upon the salvage award against freight, merely from the date of the Commissioner's Report, nearly ten years subsequent to the rendering of the salvage service. (*Opinion*, Rec. p. 209; *Decree* (*a*), (*b*), (*c*), pp. 367, 368.)

The salvors refrain from urging their claim for a further allowance to them of interest, simply because they are advised that the discretion of the court below is practically conclusive upon the question of interest.

VI.

The result of the Court of Appeals so far as it refuses to treat the voyage as broken up, and notwithstanding the sale of the cargo, holds Ward & Co. liable for freight, awarding salvage compensation out of the freight so due from them, should be sustained.

The Courts below should, however, be directed to hold Ward & Co. liable for full freight without deduction, and for additional salvage according to the actual value of the cargo.

The proportion of vessel, cargo and freight awarded to the salvors should be increased.

BRIEF OF THE ARGUMENT FOR BANQUE DE GENES, HOLDER OF BOTTOMRY BOND ON BARK AND FREIGHT.

1. The facts regarding the execution of this Bond by the master at Pensacola, July 24, 1889, immediately before starting on the voyage, are summarized in the Statement of Facts above (p. 2).

The Bond itself is printed in the Record (pp. 167, 168).

2. The facts regarding the bringing of the Libel by the bondholder and the proceedings thereunder are summarized in the Statement of Facts above (pp. 8, 10, 11, 12).

3. In the District Court and in the Circuit Court the master, as his Answer in this case shows (Rec. pp. 156–159), denied the validity of the Bond as a claim against vessel or freight. This defence was overruled by the Circuit Court (*Opinion*, pp. 183–189), and the Bond held valid.

From this result the master did not appeal. His assignments of error in the Court of Appeals (Rec. pp. 383–387) do not raise this question. Before the Court of Appeals and before this Court the validity of the bond stands uncontroverted, and it is not denied that if Ward & Co. are to pay freight, some part of it is to go to the Banque as holder of the bond.

4. The Banque contends, as have the salvors, that the voyage ought not to have been broken up, that the vessel ought to have been allowed to earn the pending freight upon which its Bond attached, and that Ward & Co., for the same reasons as urged on behalf of the salvors, should be held to make good its claim upon the freight.

Its argument here is the same as that of the salvors under points I. and II. (pp. 17–52, above).

5. The Banque contends, as do the salvors, that the freight for which Ward & Co. must answer is the full pending

freight, without deduction; and for this purpose its argument is the same as that of the salvors under point III. (pp 53–58, above).

It is to be noticed that by the principles according to which the Final Decree has been framed, the freight upon which salvage is calculated is greater than that for which Ward & Co. are held liable to the master, and through him to the holder of the bottomry bond.

For neither purpose is the full freight taken without deduction, as salvors and bond holder both contend should be be done.

But from the freight for which Ward & Co. are to answer to the master, and through him to the bond holder, one more deduction is made than is made in ascertaining the net freight which is to pay salvage, viz.: a deduction for part of the estimated earnings of the vessel during the substituted voyage. (*Opinion, Circuit Court*, pp. 208, 209.)

And this deduction, as well as that dealt with in the argument on behalf of the salvors, is claimed by the holder of the bottomry bond, to be error. (Assignments *Fourth*, *Fifth*, Rec. pp. 384, 385.)

Since the salvors' claim is prior to its own, any increase in the salvage award may have the effect of diminishing its recovery as now ordered, if net freight only, as ascertained by the Courts below, is to be taken into the account.

6. The result in the Court of Appeals should not be modified except by holding Ward & Co. liable for full freight without any deduction.

HARRINGTON PUTNAM,
FREDERIC DODGE,
EDWARD S. DODGE,
for BLACK *and*
for BANQUE DE GENES.

APPENDIX.

Effect of Capture on Pending Freight.

Story, J., in *The Nathaniel Hooper*, 3 Sumner, 542, already cited, has made it clear that the contract of affreightment is not dissolved by capture, but suspended only, so that upon recapture or restitution it re-attaches, both parties being restored to their antecedent rights (pp. 557, 559).

The Circuit Court in this case (*Opinion*, pp. 198, 199), has disregarded the above principle, referring, as did Judge Story (*The Nathaniel Hooper*, pp. 555, 6), to the inapplicability of many of the doctrines of prize law to the ordinary exigencies of commerce; and has reached its result by other methods.

The learned Judge of the Circuit Court says, that "if the vessel and cargo are restored after being captured it is by virtue of *jus postliminii*", but he makes no reference to another method by which vessel and cargo are often restored, i. e., *restitution*, when the property seized is released by the captor, as upon ransom, or because a prize court holds it not to have been lawful prize. The analogy of the rights of the owners in such cases with those is cases of derelict, is certainly much closer than the analogy in cases of recapture, where *jus postliminii* has to be relied on.

In *Spafford* v. *Dodge*, 14 Mass. 66, a chartered vessel was captured, detained for several months, and restored. It was held that the charter hire was due during the period of detention and that the wages and expense of the crew meanwhile, also the expenses incurred in the prize court, were General Average, to which vessel, cargo and freight must contribute.

In *Woods* v. *Olsen*, 99 F. R. 451, also a case of capture and restitution, the charter hire was paid during the detention, and a similar decision was made as to the liability of vessel, cargo and freight in General Average, which according to the decision might be enforced by an appropriate action, although in that case the lien upon cargo had been lost through failure to assert it in time.

As will be seen below, the French law also treats the contract of affreightment as suspended only, not dissolved, by capture; and the right of the master to freight as revived upon restitution.

Foreign Law Regarding the Effect of Shipwreck or Capture Upon the Contract of Affreightment.

Ordonnance of 1681, liv. III., tit. III., Art. 19.

This provided for the case of capture and ransom, and allowed entire freight if the cargo was delivered at its destination.

> "Si le navire et les marchandises sont rachetés, le maistre sera payé de son fret jusqu'au lieu de la prise, mesme de son fret entier, s'il les conduit au lieu de leur destination, en contribuant au rachat."

[If the ship and goods be ransomed, the master shall be paid his freight to the place where they were taken, and he shall be paid his whole freight if he conduct them to the place agreed to, he contributing toward the ransom.

Translation in Peters Adm. Rpts.]

Code de Commerce, Art. 303.

This re-enacted the above provisions of the Ordonnance, but introduced also the case of shipwreck followed by salvage.

> "Si le navire et les marchandises sont rachetés, ou si les marchandises sont sauvées du naufrage, le capitaine

est payé du fret jusqu'au lieu de la prise ou du naufrage. Il est payé du fret entier en contribuant au rachat, s'il conduit les marchandises au lieu de leur destination."

[If the vessel and cargo be ransomed, or if the cargo be saved from shipwreck, the master shall be paid the freight as far as the place of capture or shipwreck. He shall be paid his full freight, he contributing to the ransom, if he carry the goods to their place of destination.]

Valroger (Droit Maritime, Paris, 1883, vol. 2, Art. 895) discusses the question "Is freight due when the goods, having been wholly abandoned by the master, have been rescued independently of him by salvors?" After referring to a decision of the English Admiralty Court, November 17, 1874 (evidently *The Kathleen*, *supra*), and to the doctrine that no freight is due in such cases, he says, "But this principle does not appear to obtain among us", and cites a decision at Marseilles as follows:

"Un navire abandonné ayant été sauvé avec sa cargaison, dont le tiers avait été reclamé par les sauvateurs, le Tribunal de Marseille a décidé, le 9 Juillet 1867 (J. M. 1867, I. 243) que le consignataire, retrouvant les deux tiers de la cargaison, devait au capitaine les deux tiers du fret."

[A derelict vessel having been saved with her cargo, the salvage claim upon which amounted to one third, the Marseilles Tribunal decided, July 9, 1867 (Journal Marseilles, 1867, I. 243), that the consignee, on receiving two-thirds of the cargo, should pay the master two-thirds of the freight.]

The report of this case shows that the derelict was towed to its destination by a steamer by which the cargo was delivered to the consignee.

Maclachlan (4th Ed. 1892, p. 514), thus states the French law applying in case of capture:

> "When both the ship and cargo are restored, if there has been no authoritative separation of the one from the other, the original contract is not dissolved, the captor's rights till condemnation being but inchoate, and the parties to that contract are again at large, after a temporary inability, to fulfil their obligations and secure and enforce their rights."

The Italian Code of Commerce, Art. 578, is to the same effect as the French Code above quoted.

> "Se la nave e le cose caricate sono riscattate o se queste sono salvate dal naufragio, el capitano ha diritto al nolo sino al luogo della preda o del naufragio.
>
> "Contribuendo al riscatto, egli ha diritto al nolo intiero purché conduca le cose caricate al luogo della loro destinazione."

[If the ship and the cargo are ransomed, or the same are saved from shipwreck, the master has a right to freight up to the place of capture or of shipwreck.

In contributing to the ransom, he has a right to full freight if he conveys the merchandise to place of destination.]

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 213.

THE ELIZA LINES, HER CARGO AND FREIGHT.

[Including the following consolidated cases.]

HENRY P. BOOTH, APPELLANT,

v.

CATHERINE T. BLACK, ADMINISTRATRIX, ET AL.

CATHERINE T. BLACK, ADMINISTRATRIX, APPELLANT,

v.

BRADFORD DARRACH ET AL.

BANQUE DE GENES, APPELLANT.

v.

BRADFORD DARRACH ET AL.

HANS ANDREASEN, APPELLANT,

v.

BRADFORD DARRACH ET AL.

ON A WRIT AND CROSS-WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR HANS ANDREASEN,

Libellant, Appellee and Appellant.

February 8, 1890. Andreasen filed his answer in the Banque case (p. 156).

February 27, 1890. Ward & Co. moved to dismiss their own libel because the cargo had been sold (p. 125).

January 16, 1891. Ward & Co.'s libel dismissed as of November 19, 1889 (p. 125). On the same day Andreasen's libel against Ward & Co. was dismissed as against them (p. 139).

January 24, 1891. Andreasen appealed from order dismissing libel in Ward & Co.'s case (p. 125).

May 18, 1891. Final decree entered in Black's case (p. 71). On the same day a final decree was entered in the Banque case (p. 164). On the same day Andreasen and the Banque de Gênes appealed in the Banque case (p. 165).

May 14, 1891. Andreasen and Black appealed in the Black case (p. 72). On the same day Andreasen appealed from the decree in his own case against Ward & Co. (p. 142).

The appeals were heard by PUTNAM, J., in November, 1893, and in April, 1894, he filed his opinion. (See Record, pp. 173 *et seq.*) He held as follows:

a. The sale of the cargo was wrongful (p. 180).

b. The substitution of the Atlantic Insurance Co. was wrongful (p. 181).

c. Bottomry bond valid (p. 189).

d. Black could recover salvage of freight from Ward & Co. and from the vessel (p. 189).

e. Darrach should be dismissed (p. 189).

f. The District Court acquired jurisdiction over Ward & Co. (pp. 189–195).

g. Andreasen should have been allowed to complete voyage and earn his freight (pp. 195 *et seq.*).

h. Andreasen was not entitled to gross freight (p. 208).

i. The freight of the voyage to Lisbon should be deducted (p. 208).

PUTNAM, J., then ordered all the cases to be consolidated (Record, p. 363), and referred them to a Commissioner. After the final Report of the Commissioner had been filed, his Honor overruled all the exceptions to it and confirmed the report. (Record, pp. 365 *et seq.*)

All parties appealed to the Circuit Court of Appeals for the First Circuit, which affirmed the decree of the Circuit Court in all particulars except that on a rehearing freight's contribution to general average in the sum of $1525.43 was ordered not to be deducted from the amount of freight due from Ward & Co. (Record, pp. 459, 464.)

SPECIFICATION OF ERRORS RELIED ON.

Andreasen relies on two alleged errors in the decree of the Circuit Court of Appeals:

(1) That Andreasen was not entitled to gross freight.

(2) That the freight of the Lisbon voyage was deducted.

Before taking up the discussion of these errors Andreasen will consider two points in which Ward & Co. allege that the Circuit Court of Appeals was in error.

BRIEF OF THE ARGUMENT FOR ANDREASEN.

I.

Ward & Co. allege that the District Court properly decreed a sale of the cargo on the ground that the voyage was broken up, and that the Circuit Court of Appeals was in error in holding Ward & Co. liable for freight.

It is the law of England that when a vessel abandoned by the ship-owner owing to stress of weather is brought into harbor by salvors, the cargo-owner may elect to treat the contract

of affreightment as at an end if the vessel has not come into the possession of the ship-owner again.

The Kathleen, 2 Asp. M. C. 367.
The Cito, 4 Asp. M. C. 468.
The Argonaut, Shipping Gazette 1884, p. 775.
The Leptir, 5 Asp. M. C. 411.
The Arno, 8 Asp., M. C. 5.

The injustice of this rule in allowing one party to a contract to determine whether the contract shall continue is obvious. The ship-owner has not been at fault, as his abandonment of the vessel was caused by the excepted peril of the seas; but he must deliver up the goods without receiving freight, if the cargo-owner so desires, or he may be compelled to carry them on. The doctrine rests on technical grounds, and it has been suggested by a recent English writer that the ship-owner might avoid the harsh consequences of this rule by filing a caveat against the arrest of his vessel, with a stipulation to give bail for it.

Saunders, Maritime Law, p. 133.

(As to the functions of a caveat, see Williams and Bruce Admiralty Practice, 3d ed., page 267; The Crimdon (1900), P. 171).

It is worthy of remark that Andreasen, by offering to give bail for the cargo, took the course advised by the English writer, so that if this case had arisen in England the cargo-owner could not have compelled the ship-owner to give up his right to complete the contract.

The English cases do not rest on a sound basis. They overlook the true nature of a contract of carriage. In such a contract the ship-owner agrees to carry the goods to their destination; the cargo-owner agrees to pay the freight when the goods arrive;

Hunter v. *Prinsep*, 10 East, 378, 394;
The Arno, 8 Asp. M. C. 5, 6;
Ellis v. *Willard*, 9 N. Y. 529, 532;
The Tornado, 108 U. S. 342;

and under this contract the perils of the sea are excepted. The law of carriage by sea rests on the basis of this simple contract. The ship-owner has the right to carry the cargo and the cargo-owner has the right to have it carried. The ship-owner may carry to the destination (*Allen* v. *Mercantile Ins. Co.*, 44 N. Y. 437); the cargo-owner cannot get the goods at an intermediate port except by paying full freight —

Schouler Bailments, 3d ed., sect. 528;
2 Parsons Contracts, 9th ed., p. 425;
The Teutonia, 1 Asp. M. C. 32;
Palmer v. *Lorillard*, 16 Johns. 348, 355;
The Nathaniel Hooper, 3 Sumner, 542, 555;

unless they are voluntarily given up for a less amount.

2 Parsons Contract, 9th ed. p. 427.
Smyth v. *Wright*, 15 Barb. 51.
McKibbin v. *Peck*, 39 N. Y, 262.
Hunt v. *Haskell*, 24 Maine, 339.

The ship-owner has the right to complete the carriage and may have a reasonable time in which to repair his injured vessel or he may trans-ship and send the goods on in another vessel.

Shipton v. *Thornton*, 9 A. & E. 314.
The Soblomsten, L. R. 1 A. & E. 293.
McGaw v. *Ocean Ins. Co.*, 23 Pick. 405.
Harrison v. *Fortlage*, 161 U. S. 57, 65.

Ordinarily the ship-owner keeps possession of the goods during carriage, but possession in him is not essential. He

may forward the cargo in a vessel belonging to someone else if his vessel is injured,—

Shipton v. *Thornton*, 9 A. & E. 314 ;

and he is entitled to freight though the voyage be only partly performed by himself and completed by salvors or insurers.

The Nathaniel Hooper, 8 Sumn. 542, 558.
Hubbell v. *Great Western Ins. Co.*, 74 N. Y. 246.
Hughes v. *Sun Mutual Ins. Co.*, 12 Daly, 45 ; 100 N. Y. 58.

Capture by an enemy does not put an end to the right to freight, which is only suspended and revests in the ship-owner on recapture.

Carver, Carriage by Sea, 3d ed., p. 274.
The Copenhagen, 1 Rob. 289.
The Nathaniel Hooper, 8 Sumn. 542, 555 *et seq.*, where the English cases are cited and criticised. See also *Spafford* v. *Dodge*, 14 Mass. 65.

If the cargo-owner forcibly takes possession of the goods the right to freight is not thereby lost.

Braithwaite v. *Power*, 1 No. Dak. 455.

The question of possession therefore is not one of the the important things to be considered as the rights of the parties to a contract of carriage do not depend on it.

When Andreasen left the bark he had no thought of completing the voyage, but his thoughts not communicated to the cargo-owner had no effect on the relations between the parties. He had the right to carry the lumber to Montevideo. He never gave up this right. His excusable abandonment of the vessel was not a breach of the contract because it was a thing mutually expected and expressly allowed for. (*Cargo of the Bark Luteken*, 6 Ben. 565, 569.)

The only way in which Ward & Co. could have got their cargo at Boston, unless Andreasen agreed to give it up, was by paying full freight for it. Andreasen could insist on carrying it on, as he did insist, and he would be obliged to give it up only on payment of the full amount. Ward & Co. might waive the performance of the contract by him but they must carry out their part of the contract by paying full freight unless he waived the performance on their side.

Ellis v. *Willard*, 9 N. Y. 529.

The case of *Roehm* v. *Horst*, 178 U. S. 1, is not an authority in the case at bar, as in that case one party to the contract had told the other that he would not abide by his agreement. The buyer refused to take the hops. Here Andreasen demanded the right to go on with the voyage. His leaving the vessel was excused by the terms of the agreement, and he insisted on carrying out the contract. *Roehm* v. *Horst* is an instance of what is known as anticipatory breach of contract. In the case at bar there is no breach at all; Andreasen never agreed that he would not leave the ship. On the contrary, the perils of the seas were excepted, one of the most frequent of such perils being shipwreck. His leaving the ship was not a breach of contract. (*Cargo of the Bark Luteken*, 6 Ben. 565, 569.) He still had the right to perform the contract, and all his subsequent acts were directed to that end.

It is stated that a doctrine contrary to the English one would allow the ship-owner to elect whether he would carry on the goods (Brief for Petitioners, p, 25) and that this result would be as unjust as to allow the cargo-owner to elect. If this should be the outcome of the doctrine it would result from the contract which the parties entered into. The ship-owner would be excused from completing the contract if it were prevented by perils of the seas. There is no injustice in throwing on the parties to a contract the results of their own agreements. But it is submitted that in the case at bar the ship-

owner having recovered his vessel, would have been obliged to go on. The clause relating to perils of the sea would excuse his abandonment of the vessel, but would not excuse his refusal to carry out the voyage. When Andreasen rejoined his vessel at Boston the situation was the same as if he had not been obliged to abandon her but had put into a port of necessity. The question was whether he could repair his ship within a reasonable time and complete the voyage. He found that he could repair the ship and carry on the lumber without unreasonable delay, and he was bound to do so. If he had refused so to do he could not have recovered any freight at all;

2 Parsons Contracts, 9th ed., p. 427;
Hunter v. *Prinsep*, 10 East, 378, 394;
Portland Bank v. *Stubbs*, 6 Mass. 422;
Adams v. *Haught*, 14 Tex. 243;
Welch v. *Hicks*, 6 Cowen, 504;

but would have been liable in damages for breach of the contract of carriage.

Hill v. *Wilson*, 4 C. P. D. 329.
Assicurazioni Generali v. *S. S. Bessie Morris Co.* (1892), 1 Q. B. 571.

Andreasen had a lien on the cargo for general average charges caused by the cutting away of the masts.

Dupont de Nemours v. *Vance*, 19 How. 162.

This right was superior to any right of the cargo-owner to his goods entirely independent of the question of freight. It was manifestly unjust to Andreasen to deprive him of this right, as was the result in this case. By the sale his lien was rendered of no value.

The cargo laden on the Eliza Lines was lumber specially designed for the South American market and would have been worth very many times what it sold for in Boston. The

Commissioner found that it would have been worth $6501.91. (Record, p. 247.) If the consignees had refused to receive the lumber at Montevideo, Andreasen could have sold it and satisfied the salvage charges and his lien for freight and also the general average charges. In this case the amount realized would have been more than sufficient to satisfy all charges. The opportunity to do this was denied him.

II.

Ward & Co. allege that the sale of the cargo in the District Court determined the rights of all parties and restricted them to the proceeds in the registry, and that the Circuit Court of Appeals was in error in decreeing that Ward & Co. were liable in excess of the proceeds

The sale in the District Court did not change the rights and duties of the parties toward one another. These rights were dependent on their contract over which the Court had no control. The Court had control over the cargo; the sale passed a good title to the purchaser, and the other parties thereby lost all right of title or possession to the cargo. No one has ever denied the power of a court of admiralty to pass a title good against all the world. The authorities cited by the cargo-owners establish this proposition, but they go no further. They do not hold that thereby all parties lose all rights as between themselves. In this case Andreasen had a contract with Ward & Co. and they with him. The Court could not impose any conditions other than those contained in the contract. By decreeing a sale the relations of the parties were not changed. They could not be changed except by mutual agreement. The result of the sale, as far as Andreasen's rights were concerned, was the same as if Ward & Co. had brought it about without the help of an admiralty court. If the Court was wrong in ordering a sale the result must be that the rights of Andreasen are not thereby affected. Otherwise the result of a wrongful sale would be the same as that of a

rightful one. Andreasen, having been wrongfully deprived of his right to earn freight, would have no more redress than in a case where the sale was proper. The injustice of this result is so apparent that we ought not to allow it unless we are concluded by authority.

But there is no authority for such a doctrine. It it everywhere held that where a decree of a lower court is erroneous, the party procuring the decree is liable in damages to the injured party just as if the decree had not been entered.

2 Freeman's Judgments, 4th ed., sections 481, 482.
3 Freeman's Executions, 3d ed., section 346.
Bank of U. S. v. *Bank of Washington*, 6 Peters, 8.
N. W. Fuel Co. v. *Brock*, 139 U. S. 216.
Andrews v. *Thum*, 71 Fed. Rep. 763
Cowdery v. *London & San Francisco Bank*, 139 Cal. 298, and see a learned note to this case by A. C. Freeman, Esq., in 96 Am. State Rep. 115.

This doctrine does not interfere with the effect of a decree relating to a sale of goods to third parties. The title to the goods has passed and cannot be upset (3 Freeman's Executions, 3d ed., sect. 345). Nor is there any disposition in this case to upset it. But the rights of the parties between themselves are the same as if no court decree had been entered. The obligations of Ward & Co. toward the other parties is not limited to the amount realized by the sale of the cargo.

Close v. *Stuart*, 4 Wend. 95.
Carpy v. *Dowdell*, 131 Cal. 499.

A contrary doctrine would give to a District Court a power possessed by no other court in the world. Courts can determine only the rights of parties under the law. They cannot add to or subtract from these rights. But under the supposed doctrine a District Court can order a sale and thereby absolve one of the parties from all liability to the other

beyond the amount realized by the sale. The sale cannot be effectively reviewed by any court since all that the reviewing court can say is that the sale is wrong but that the effect of it cannot be changed. The result would be that from a sale in the District Court in admiralty there could be no appeal.

The District Court would be a law unto itself and its errors in cases where sales were ordered could be changed by no appellate court.

III.

Andreasen alleges for error that the Circuit Court of Appeals awarded net instead of gross freight and deducted the freight of the Lisbon voyage. These two assignments depend on the same principles and will be considered together.

The freight to be paid at Boston was full freight subject to no deductions. Full freight was due under the terms of the contract and not as damages for breach of contract. The proposition that a party injured must do all in his power to reduce damages is applicable to cases of breach of contract where only actual damages suffered are to be recovered.

Sutherland Damages, 3d ed.; section 155.
Warren v. *Stoddart*, 105 U. S. 224.

Here full freight is due, not as damages for breach of contract, but because the contract itself requires the payment of full freight in return for the performance by the other party, or where that performance is waived.

See cases cited, *supra*, p. 7.

In this case the cargo-owner forcibly took possession of the goods and he must pay full freight.

Braithwaite v. *Power*, 1 No. Dak. 455.

Andreasen was entitled to full freight. No deductions should have been made from this amount. Ward & Co. are not entitled to be credited with the amount which Andreasen

earned on the voyage to Lisbon. The question is, not what amount Andreasen has lost but what the liability of Ward & Co. is for having seized the goods. In cases where the injured party is insured it is no defense to the wrong-doer that the insurance has been paid.

Clark v. *Wilson*, 103 Mass. 219.
Chicago Co. v. *Pullman Co.*, 139 U. S. 79.

Here the same rules should apply as have always been laid down in cases where the voyage was prevented by the cargo-owners.

Shipton v. *Thornton*, 9 A. & E. 314, 335.
Cargo ex Galam, Br. & Lush, 167.
The Soblomsten, L. R. 1 A. & E. 293.
The Nathaniel Hooper, 3 Sumner, 542, 555.

The voyage was prevented by Ward & Co. as the Circuit Court rightly determined. (Rec. p. 180.)

They are, therefore, liable to the same extent as other cargo-owners who have broken up a voyage which the ship-owner was willing to carry on.

IV.

The decree of the Circuit Court of Appeals should be affirmed except as to the allowance of net freight and the deduction of the freight of the Lisbon voyage, and in these particulars it should be revised.

JOHN LOWELL,
JAMES A. LOWELL,
for HANS ANDREASEN.

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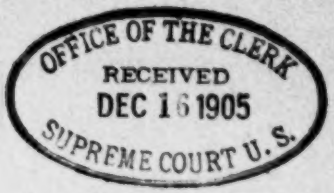

Supreme Court of the United States

OCTOBER TERM, 1905

No. 12

THE ELIZA LINES

PETITION FOR REHEARING

Edward S. Dodge
John Lowell
James A. Lowell
Harrington Putnam
Counsel

SUPREME COURT OF THE UNITED STATES

No. 12—October Term, 1905

The Eliza Lines } Petition for Rehearing

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Catherine T. Black, administratrix, Banque de Gênes and Hans Andreasen, respondents and appellants in the above cause, respectfully shows to this Honorable Court:

The judgments in the three courts below conceded to the master and owners of the *Eliza Lines* the right of general average contribution against the cargo. The District Court, however, subjected the cargo to a payment of *pro rata* freight. By this payment and the superior lien for salvage, the District Court marshalled the funds in the registry so that nothing remained to satisfy the general average lien. The reasoning of the Supreme Court just announced would lead to the result that the cargo was not to be charged with any *pro rata* freight, and that, therefore, as between the shipowner and the proceeds in the registry some part of the general average contribution should be satisfied. This, however, is rendered doubtful by the opinion of the majority of this Court. Near the end of the opinion, Mr. Justice Holmes says:

"The argument urged to the effect that the cargo's liability to general average created a right to have the voyage finished, however it might have been otherwise, does not need an extended answer. The cargo owners had the

same right to treat the contract as ended as against a shipowner who had cut down a mast that they would have had against one who had made no sacrifice for the common good. The contract is the supreme source of mutual rights, and cannot be overridden by the incidents of its performance."

This reasoning in the opinion of the Court would exclude all right of general average recovery, because of the renunciation of the contract of carriage. It is respectfully submitted that this conclusion, if permitted to stand, will be oppressive to the interests here involved.

The doctrine, thus declared, that the right to contribution is dependent on contract, is contrary to received authority.

Judge Story says of general average:

"The principle upon which this contribution is founded is *not* the result of contract, but has its origin in the plain dictates of natural law" (1 Story, Eq. Jur., § 490).

Other definitions also derive this right of contribution from the equity of the benefit received and not from any prior contractual obligation.

"General average," said Lord Stowell, in the *Copenhagen*, 1 Ch. Robinson, 289, 293,

"is for a loss incurred towards which the whole concern is bound to contribute *pro rata*, because it was undergone for the general benefit and preservation of the whole."

In Birkley *vs.* Presgrave, 1 East., 219, 228, Mr. Justice Lawrence propounded the definition:

"All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo, come within general average, and must be borne proportionably by all who are interested. *Natural justice requires this.*"

Mr. Justice Curtis, citing many authorities, said:

"But this right to contribution does not arise from contract. It depends upon a principle of natural justice

that they who have received a common benefit from a sacrifice, voluntarily made by one engaged in a common adventure, should unite to make good the loss which that sacrifice occasioned." Sturgis *vs.* Cary, 2 Curtis, 384.

In Burton *vs.* English, 12 Q. B. D., p. 218, Lord Esher said of the original principle of general average:

"Lord Bramwell, in his judgment in *Wright* vs. *Marwood*, considers it to arise from an implied contract; but though I always have great doubts, where I differ from Lord Bramwell, I do not think that it forms any part of the contract to carry, and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England, as the law of the ocean. *It is not as a matter of contract*, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved."

In Meeker *vs.* Klemm, 11 Louisiana Ann., 104, the Court (Lea, *J.*) said of general average:

"If we refer to the principle upon which a liability for contribution to a general average loss is based, we find that it rests upon the broad and equitable doctrine that no one shall enrich himself at another's expense. * * * *It is an obligation, not based upon contract*, but one resting upon natural equity."

This has been recognized by this Court. Mr. Justice Nelson delivering the opinion of the Court in a case touching the Act of Congress of 1845, enlarging the jurisdiction of the Admiralty, said:

"We think it also a matter of grave doubt if the act confers jurisdiction in cases of salvage, jettison or *general average. These are not matters of contract* according to the most eminent commentators on the subject, and they certainly are not cases of tort." The *Eagle*, 8 Wall., 15, 23.

In a leading authority, Mr. Justice Gray said:

"As the right to general average may be considered as resting *not merely* on implied contract between the parties

to the common adventure, *but rather on the established law of the sea*, in the light of and subject to which all owners of ships and cargoes undertake maritime adventures, so the authority of the master may be treated as resting either on implied contract of the parties, or on the duty imposed upon him by the law, as incident to his station and office, to meet the necessity created by an emergency which could not be foreseen or provided for, and to prevent the property in his custody and control from being left without protection and care." Ralli *v.* Troop, 157 U. S., 386, 397.

In Marwick *v.* Rogers, 163 Mass., 50, 52, the Supreme Court of that State declared, in an opinion by Justice Barker (in which Justice Holmes concurred):

"The obligation to contribute to a general average loss, or to average expenses, springs from the law itself, and not from any contract between the parties concerned."

The statement therefore that the contract is "the supreme source of mutual rights" must be understood with qualifications. If this dictum shall remain, grave doubts will arise in future cases where the violence of the peril or the force of the destructive element shall cause the temporary abandonment of the vessel.

To illustrate: A sudden outbreak of fire on shipboard may drive her master and crew over the ship's side and cause her abandonment. It has however never been contended that this action, compelled by an overpowering force, amounted to a renunciation of the right to exact equitable contribution for previous sacrifices.

Counsel for Andreasen did not directly argue these propositions in this court. They rather referred to these principles as additional grounds supporting the master's right to hold the cargo against the demands by Ward & Co.

The distinction between this right to general average and the contract relations between vessel and cargo has

been recognized in British Courts, even those which follow the *Kathleen*. In an appendix is printed the unreported case of the *Annie M. Allen* in the Vice Admiralty Court of Halifax (December 5th, 1881). It will be seen that the Court held the right to general average contribution from cargo remained valid and enforceable, after the vessel had been abandoned at sea as derelict.

It is respectfully submitted that the decision of the majority of this Court in the case at bar, even if limited to the contract obligations between vessel and cargo, raises a grave question of public policy. If, however, it is to be understood as declaring the doctrine that all general average rights existing before the abandonment of the ship are lost by such act, then a radical departure is made from the course of previous authorities, both in this country and in Great Britain.

The *Eliza Lines*, while frequently cited under charter-parties and contracts, has been more often referred to by general average adjusters, and underwriters. It will remain an enduring authority, which it is hoped will not leave an erroneous impression of what the Court intended to decide.

The question of possession was fully argued before the Court and we have no desire to re-state the positions asserted. We, however, call the Court's attention to the doctrine of the civil and maritime law, endorsed by the decisions of Judges Ware and Story that the salvor of a derelict vessel is the protector of the property for whomever may turn out to be the owner, and being *negotiorum gestor*, his possession is not adverse to the title of the master.

In view of the approval of Lord Tenterdens' decision in Thornely *vs.* Hebson (2 B. & Ald., 513), by the British Court in the *Annie M. Allen*, we are unable to believe that this Court intends to disregard the principles of that

decision which have hitherto been accepted in the maritime world.

No danger of navigation is more generally recognized than that which arises—particularly to modern passenger steamships—from derelicts, especially from derelicts loaded with lumber. Such vessels and cargoes are, usually, of comparative small value, and there is little enough to induce salvors to bring them in. But all Admiralty Courts have hitherto recognized the policy and principle of giving to salvors rewards sufficiently large to induce them to render assistance to such property in distress.

If now it is declared—as it is by this decision—that the salvor can receive no salvage on freight, and that it is largely dependent upon the will of the cargo owner whether he shall receive any salvage on the cargo or not, it is certain to prove a great discouragement to the class of vessels and seamen which ordinarily are willing to engage in salving property.

Even if the contract of carriage were annulled by the abandonment, the claim of the salvors and the claim for the sacrifice in general average are not dependent upon any contract.

Should the mandate be sent down to the Court below with the usual direction to take further proceedings in accordance with this opinion, these respondents may be put to heavy expenses and possibly a second application for *certiorari* in order finally to determine the exact scope of this decision. The general average question is of greater moment than perhaps appears to this Court from the fact that only the masts and rigging were cut away. Its importance as a precedent can hardly be overstated. As general average questions seldom reach this tribunal since the statute of 1890, the petitioners desire that any utterance of this Court on the subject should be made clear beyond question, and not involve the peculiar doctrines of general

average with those obligations of vessel and cargo that arise from contract.

The opinion of the Court does not deal specifically at all, with any of the errors assigned by these petitioners and brought up by their cross-writ of *certiorari.*

The errors discussed in the brief for Catharine T. Black, administratrix, and for Banque de Gênes, at IV., pp. 58, 59; V. pp. 60–66; and in the Brief for Hans Andreasen at II., pp. 11–13, are not connected with the questions concerning freight brought to this Court by the cargo owners.

If this Court, although not dealing specifically with such errors assigned, intended to make no alteration in the decrees below in the particulars to which such errors assigned relate, it should at least preserve to the salvors the benefit of the decree, made in their behalf, in the Circuit Court, viz.:

Against vessel (appraised at $2,250).	$1,472 17
Against cargo (proceeds $910.74).....	595 89
	$2,068 06

(See brief for Black, Admx., and Banque de Gênes, p. 13; Final Decree of Circuit Court, *First* (a), (b), Record, pp. 367, 368.)

It should also preserve to the Banque de Gênes the benefits of the decree, made in its behalf, in the Circuit Court, viz.:

Against vessel.....	$777 83
Against Andreasen for costs.....	131 73

(See brief for Black, Admx., and Banque de Gênes, p. 14; Final Decree of Circuit Court, *Second* (a), (b), pp. 369, 370.)

No appeal from so much of the decree of the Circuit Court was ever taken by Ward & Co., the cargo owners, who manifestly had no interest in it.

(See brief for Henry P. Booth, surviving partner of the firm of James E. Ward & Co., pp. 5, 35.)

It will be noted, also, that the Circuit Court awarded to the Banque de Gênes, the sum of $314.85, the remainder of the proceeds of the cargo after deducting salvage, treating this amount as part satisfaction of Ward & Co.'s liability for freight.

(See brief for Black, Admx., and for Banque de Gênes, p. 14; Final Decree of Circuit Court, *Second* (b), pp. 369, 370.)

As now by the decision of this Court, no liability for freight existed, said sum of $314.85, representing the remainder of the proceeds of the cargo (as above stated), should now be subjected to a decree in favor of Andreasen, in part satisfaction of his lien against the cargo for general average. His claim for general average against cargo was not assessed owing to the exhaustion of the proceeds by a prior freight lien. See report of Mr. Gore, the assessor (pp. 140, 141.) The quota from cargo apparently would far exceed this remnant of the proceeds.

Wherefore your petitioners pray for a rehearing of the cause, or that, if the errors assigned by them are not to be further considered, the mandate from the Court may specifically provide and direct to the Circuit Court:

1. To disallow to the master any sum whatever for *pro rata* freight.

2. As against the vessel and cargo proceeds to allow to the salvors (Catherine T. Black, as administratrix)

From vessel.....$1,472 17
From cargo proceeds..... 595 89

3. To the Banque de Gênes to allow the sum of $777.83 to be paid by the vessel, and the sum of $131.73 costs to be paid by Andreasen.

4. To Hans Andreasen, master, for General Average the residue of the proceeds of cargo in the registry, being $314.85.

And for such other or further proceedings, orders or decrees not inconsistent with this opinion as may be necessary for the final disposition of the case.

CATHERINE T. BLACK, Administratrix,
BANQUE DE GÊNES,
By EDWARD S. DODGE, Proctor;
HARRINGTON PUTNAM, Advocate.

HANS ANDREASEN, Master,
By JOHN LOWELL,
JAMES A. LOWELL, Proctors.

APPENDIX.

In the Vice-Admiralty Court.

HALIFAX, 1881, No. 405.

THE ANNIE M. ALLEN.

Judgment.

This vessel was abandoned at sea on a voyage from Sagua Le Grand to New York in the month of April last, and having been picked up derelict at sea was towed into the Harbor of Halifax and libelled in this Court by the Acting Queen's Advocate. The salvors intervened, claiming salvage, as also did the owners of the vessel and cargo. On application to the Court by the respective owners of the vessel and cargo, writs of restitution issued, directing the delivery to them of the property claimed, on security being filed for the payment by the owners of the vessel of such salvage and expenses as should be thereafter decreed, and by the owners of the cargo of such salvage freight general average contribution and expenses as should be thereafter decreed. Bail was thereupon filed for the ship on the 29th day of April last past, and for the cargo on the 2d day of May last past, and thereupon the vessel and cargo were delivered to and taken possession of by their respective owners on the said 2d day of May and before the delivery of the cargo to the owners thereof the owners of the *Annie M. Allen* by their agent notified the owners of the cargo that they intended forthwith to repair the vessel and convey the cargo to its destination with all possible despatch.

The owners of that portion of the cargo consisting of sugar sold the property in Halifax, while the owners of the iron rails notified the master, acting as agent of the owners of the vessel, that they required him to complete his contract by carrying the rails to New York. This he refused or neglected to do, and the rails were forwarded to New York by the owners. The suit for salvage was heard before the Court, and on the 29th day of August last past and judgment was delivered on the 19th Sept. awarding salvage to the claimants. On the 19th August an act on petition was filed on the part of John B. Allen, the owner of the *Annie M. Allen*, claiming who decreed out of the funds in Court the freight under the charter-party and bills of lading, and also a general average contribution for injuries sustained on the voyage and before the abandon-

ment of the vessel by the master and crew. This claim was opposed on the part of the owners of the cargo, and the question was argued before me on the facts admitted by the counsel of the respective parties by memorandum signed by them and dated the 2d day of May and on the facts in proof in the cause.

Mr. Henry, Q. C., for the owners of cargo as to freight, took the ground that by the abandonment of the vessel at sea, the contract of affreightment was abrogated and cited the *Kathleen*, 2 Asp. M. Cases, 367. The decision in this case appears to be so directly in point, and the authority is so imperative that it does not appear necessary to discuss the principles upon which it rests. As to that branch of the case, therefore, the decree must be against the claim for freight.

The claim for general average is opposed on two grounds.

1st. The Court has no jurisdiction in questions of general average.

2d. There is no claim to enforce, as the lien for general average has been lost by the abandonment of the ship and cargo at sea, and the consequent abandonment of the possession on which the lien against the cargo rested.

On the first ground, and admitting for the sake of this argument that the lien was not lost, as contended by Mr. Henry, the case of the *Galam*, B. & L., 167, is authority for the position that this court has jurisdiction to enforce a possessory lien for general average when it arises in the court incidentally in the progress of a cause over which the court has properly jurisdiction. This claim did so arise in this court, and the question remains, whether when the writs of restitution issued, the master of the *Annie M. Allen* possessed and retained a lien on the cargo of that vessel for a general average claim justly chargeable against the cargo. The right of lien is a strict and entire common law right, existing as a general rule in those cases only where actual or *constructive* possession of goods is in the party claiming to exercise it. If the possession be parted with after the lien attaches, except in some special instances, subsequent repossession will not revest the lien for the particular claim in respect of which it was originally exercisable. Cross on Lien L., and again at page 28 the same author says: "The right of lien is necessarily subservient to and dependent upon the right of possession of the chattel over which it is claimed," and in the case of the *Galam* above cited, the court referring to the same subject remarked: "It is a possessory lien at common law by virtue of which he is entitled to hold goods till his lien be satisfied."

Did the master of the *Annie M. Allen* lose the lien acquired by law for this general average contribution by reason of his abandonment of his vessel at sea in distress, and for the purpose and only purpose of saving the lives of himself and crew? It will be recollected that the damages on account of which this contribution is claimed were suffered by the *Annie M. Allen* before the abandonment by the master and crew. After such abandonment, as I have said, she was picked up at sea derelict and towed into the port where the master and owner through the process of the court became repossessed of the vessel and remained so possessed of the vessel and cargo from the 29th of Apr. till the 2nd of May, on which day the owners of the cargo by and through the decree and process of this court, and not by or with the consent of the master or owners of the *Annie M. Allen*, became possessed of the cargo upon which the lien is claimed and which the court is asked to enforce.

In Thornely *v.* Hebson, 2nd book of Arnold, 513, the master and crew of the ship *William* then in distress and supposed to be sinking, abandoned their vessel for the safety of their lives and were taken on board the *Hyder Ali*, which had lain by the *William* all night, for the purpose of rescuing the crew. The latter were taken on board the *Hyder Ali* in an exhausted condition utterly unable to help themselves or make any further exertion for the safety of their ship and her cargo. Their vessel was in fact as completely abandoned and derelict as was the *Annie M. Allen* when her master and crew left her to go on board the steamer *Wilmington*. There happened to be on board the *Hyder Ali* a number of seamen, passengers who volunteered at the risk of their lives to go on board the *William* and endeavor to carry her into port. This was not done at the request or on account of, in partnership with, or by permission of the master of the *William*, which vessel was treated by them, as she in fact was, as derelict. These people succeeded in taking the *William* into Newport, U. S., where she was libelled in the Court of Admiralty; and ultimately sold for the salvage. The owners of the *William* gave notice of abandonment to the underwriters and claimed as for a total loss. The Court, composed of some of the most eminent of the many great Judges of England, held that there was no total loss because of an abandonment at sea and desertion of the crew did not cause to the owners the loss of the beneficial use of the vessel, and of itself gave them no right to abandon, and that in law the owners were never divested of the possession of the vessel. Abbott, *Ch. J.*, said: "It appears to me that there was not a total loss at any period

until the assured allowed the ship to be sold under the decree of the Admiralty Court at Rhode Island, which they might have prevented; and it certainly was their duty to have prevented the loss of the ship by raising money and paying the salvage."

Bayley J.—The plaintiffs rely upon two circumstances in order to constitute this a total loss; the first is a desertion of the ship by the crew, and the second the sale at Rhode Island. Now where the ship is captured, she is taken possession of by persons *adversely* to the owner, and so it is in the case of barratry, but here the ship was taken possession of by persons acting not adversely but for the joint benefit of themselves and the owners, *and the latter were never dispossessed of the vessel.*

Holroyd J.—"I am of the same opinion. The desertion of the ship by the crew does not of itself constitute a total loss, and the subsequent taking possession by the salvors was not adverse, but an act *done for the benefit of the owners*, and therefore *did not dispossess them.* The custody of the vessel was in the salvors till the salvage was paid, *but the legal possession* was still in the owners."

So I think here, the legal possession was never, in my opinion, out of the owner of the vessel. He resumed the actual custody at the earliest moment in the manner indicated as legal and proper in the learned opinions just cited, and was entitled to exercise his possessory lien over the property then and always in his legal possession. It follows, therefore, that there must be a decree for the general average contribution claimed for with costs, the amount to be ascertained by the Registrar in the usual way.

Supreme Court of the United States.

No. 12.—October Term, 1905.

The Eliza Lines. } On Writ and Cross Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

[October 30, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This case comes here by certiorari to the Circuit Court of Appeals. The decree in that Court was made in a cause in which were consolidated four suits: A libel for salvage against the Eliza Lines, her cargo and freight; a libel for possession by the cargo-owners against the cargo; a libel by the master against cargo and cargo-owners for freight and general average, and a libel by a bottomry lender against the vessel and freight. The Eliza Lines, a Norwegian bark, was bound on a voyage from Pensacola to Montevideo with a cargo of lumber, under a charter party, "the dangers of the seas, fire and navigation always mutually excepted." It was abandoned, justifiably, in consequence of dangers of the seas, and was afterwards picked up by salvors and brought into Boston on September 19, 1889. The master was notified by the owners and came on from St. John, New Brunswick, arriving on September 21. The cargo-owners (Ward & Co.) and the master both demanded possession of the cargo from the salvors, but the salvors retained possession and filed their libel for salvage on September 26. The next day the master filed a claim for ship and cargo and within an hour Ward & Co. filed their claim for the cargo as above mentioned. On October 5 the vessel was delivered to the master, and on October 18 the master moved for a delivery of the cargo to him upon stipulation in order to resume his voyage, while Ward & Co. moved that the cargo be sold on the ground that its value was rapidly diminishing by reason of charges and costs. The former motion was denied and the latter granted on November 16. On November 27 the master filed his libel for freight and general average. The Circuit Court, reversing the decision of the District Court, held that the master should have been allowed to complete the voyage and earn freight, and charged the cargo-owners personally with the net freight that would have been earned, with other particulars not necessary to mention. 61 Fed. Rep. 308. 102 Fed. Rep. 184. The decree was affirmed with a slight variation by the Circuit Court of Appeals. 114 Fed. Rep. 307.

The question is whether the abandonment of the vessel by the master and crew gave the cargo-owners a right to refuse to go on with the voyage

in the circumstances disclosed; in other words, whether the cargo-owners properly were treated as guilty of a breach of contract for preventing the continuance of the voyage by their refusal and by procuring a sale. It will be noticed that the decree must stand on the ground that the contract was broken by the cargo-owners and that the ship-owners were entitled to recover under it, although the voyage was not completed. The decree was not upon a new contract such as it was attempted to set up in *Hopper* v. *Burness*, 1 C. P. D. 137, or upon the analogy of a *quantum meruit* at common law, which was expressly disavowed. The very foundation of a recovery upon the latter ground is that the express contract is out of the way, but that a benefit has been received which ought to be paid for. Therefore, in such a case the recovery cannot exceed the benefit, as often has been explained in the books. *Gillis* v. *Cobe*, 177 Mass. 584. Keener, Quasi-Contracts, Ch. 4. See *Flaherty* v. *Doane*, 1 Lowell, 148, 150. In the case at bar, while the District Court allowed freight pro rata as a charge on the proceeds of the cargo, the Circuit Court of Appeals held the cargo-owners personally for a sum much exceeding that amount, and therefore much exceeding the benefit actually received. It will not be necessary to consider the decree of the District Court, since that was not appealed from by the cargo-owners, and we shall not discuss the effect of the judicial sale, as it is not necessary in the view which we take.

There is no doubt that the English decisions confidently assert the cargo-owners' right to refuse to go on. They may be read in the reports, and there is no need to do more than to refer to them. *The Arno*, 8 Asp. Mar. Cas. 5. *The Leptir*, 5 Asp. Mar. Cas. 411. *The Argonaut*, Shipping Gazette, Weekly Summary, Dec. 5, 1884, p. 775. *The Cito*, 7 P. D. 5. *The Kathleen*, L. R. 4 Ad. & Ec. 269. The only point which they leave open is whether, if the master should get the abandoned vessel and cargo back from the salvors before the cargo-owners had declared an election to end the contract, he might in that way revive his right to finish the voyage. On that point it is enough to say here that if the English rule is right, then, even if there is any such qualification to it, the exception must depend upon something more substantial than a few minutes' priority in filing a libel, when neither master or cargo-owner has possession either of cargo or ship, as, plainly, neither had in this case.

The right of cargo-owners to treat the contract as ended by the abandonment of the ship was asserted much earlier than the English cases by Judge Ware in *The Elizabeth and Jane*, 1 Ware, 41, s. c. 15 Fed. Cas. 478, Case No. 8321, and earlier still by Mr. Story before he became a justice of this Court, in his Edition of Abbott on Shipping (1810), pp. 338, 512, citing *Dunnett* v. *Tomhagen*, 3 Johns. 154, and *Mason* v. *Ship Blaireau*, 2 Cranch, 240. We see nothing in *The Nathaniel Hooper*, 3 Sumner, 542,

sufficient to prove that he changed his opinion. That case is cited in 3 Kent, Comm., 13th ed. 228, along with *Post* v. *Robertson*, 1 Johns. 24, in which and in *Dunnett* v. *Tomhagen, supra*, the Supreme Court of New York and Chief Justice Kent took the same general view, subject to the question whether there might be a recovery on a *quantum meruit* when benefits were accepted under the contract, in spite of a failure of complete performance. See *Caze* v. *Baltimore Ins. Co.*, 7 Cranch, 358, 362. 3 Kent, Comm. 229. Other cases are *The Mansanito*, 22 Fed. Cas. 594, No. 13075. *The James Martin*, 88 Fed. Rep. 649. See also 3 Kent, Comm. 196. In short, we are aware of no decision in this country or in England before the present case which casts any doubt upon the rule.

It was thought by the Circuit Court and Circuit Court of Appeals that the doctrine so unanimously sanctioned by so many of the most eminent judges of this country and of England is unjust, and the case was put of a long voyage nearly completed and the ship and cargo subsequently brought by salvors intact to the port of destination. But we are of opinion that there is no injustice in holding that what excuses the ship excuses the cargo, and that the rule is in accord with the general principles of contract. Subject to the question whether the cargo-owners broke their contract, it seems to us more unjust to charge them personally, in favor of those who failed to complete the voyage as contemplated, with a sum much exceeding the benefit which the cargo-owners received from what was done. Of course it is desirable, if there is no injustice, that the maritime law of this country and of England should agree.

To begin at a distance, a repudiation of a contract, amounting to a breach, warrants the other party in going no further in performance on his side. *Roehm* v *Horst*, 178 U. S. 1. But the same thing is true of an absolute repudiation not amounting to a breach. *Frost* v. *Knight*, L. R. 7 Ex. 111, 113. *Phillpotts* v. *Evans*, 5 M. & W. 475, 477. *Ballou* v. *Billings*, 136 Mass. 307, 309.

It appears to us and we shall try to prove that an abandonment of the ship must be regarded as a renunciation of the contract, even if not a repudiation of its terms as binding. It is an overt act which is more than an attempt to give up the voyage. It not merely makes the completion of the voyage so improbable, by reason of the helplessness in which the ship is left and the intent with which the act is done, as practically to destroy the value of the contract to the cargo-owner, see *Swift* v. *United States*, 196 U. S. 375 396, it is a present failure to do what the contract requires, if the purposes of the contract are to be carried out. The requirement is shown by the fact that the abandonment would be a cause of action unless justified. It not only would be a breach of contract but no one questions that it would authorize a rescission of the contract on the other side, which not every breach of contract does. That it would author-

ize rescission or refusal to allow the master to change his mind if the vessel was saved shows that a continuous intent and effort to go on with the voyage is an essential condition to the obligation to pay freight. It shows, what needs no illustration, that the continuous care of the master is the main object of the cargo-owners' interest in the contract. By the general principles of contract an open cessation of performance with the intent to do no more, even if justified, excuses the other party from further performance on his side. The principle is not peculiar to charter parties, it is illustrated in other parts of the law. See *Roehm* v. *Horst*, 178 U. S. 1.

In the case at bar the vessel was abandoned with the intent not to return to her or to complete the voyage. This is admitted, if admission be necessary, by the testimony of the master. Of course it is not disputed that the completion of the voyage and delivery of the cargo are absolute conditions to the undertaking to pay freight, by the express terms of the contract and the familiar rule of law. 3 Kent, Comm. 220, 228. The master left ship and cargo to their fate, and we cannot doubt, although it was denied, that, after he had done so, if the cargo owners had been the salvors they could have treated the voyage as at an end. The ground must be that the abandonment was more than an attempt, or a mere offer of rescission which might be revoked by the master before acceptance, and that it was an unequivocal departure from the conditions which the contract imposed. If the abandonment had been unjustified and a breach of contract, of course it would not have ended the contract, but would have left the choice whether to end it or not to the cargo-owner. If justified, the simplest view would be that it was so because the contract authorized the master to end it when prevented from performance by perils of the sea, and that the contract was ended. But at all events, as control of the ship and voyage was given up and never regained, the abandonment at least gave an irrevocable power to the cargo-owners to decline to be further bound. See, in addition to cases cited above, 3 Kent, Comm. 196. The opposite view must be that the master still is bound to go on with the voyage notwithstanding his justifiable abandonment, if a chance should turn up, a view which leaves his duties in a very ambiguous shape, or else that the master has the choice, which gives the election to the party whose act has made the trouble, as against the party that has done nothing and has had nothing to say.

If it be true that if, on the other hand, the master had rejoined the ship before any one else had taken possession, or had got it back from the salvors before the cargo-owners had been heard from, he might have had a right to complete the voyage, the ground must be that the law would not insist on a technical breach of condition when there had been no substantial change of circumstances and no harm done.

The argument on the other side consists largely in the attempt to treat leaving the ship under stress of perils of the sea as not distinguishable on principle from being torn bodily away from it by tempest. This is one of the oldest fallacies of the law. The difference between the two is the difference between an act and no act. The distinction is well settled in the parallel instance of duress by threats, as distinguished from overmastering physical force applied to a man's body and imparting to it the motion sought to be attributed to him. In the former case there is a choice and therefore an act, no less when the motive commonly is recognized as very strong or even generally overpowering, than when it is one which would affect the particular person only and not the public at large. It has been held on this ground that duress created by fear of immediate death did not excuse a trespass. *Gilbert* v. *Stone*, Aleyn, 35; s. c. Style, 72. *Scott* v. *Shepherd*, 2 W. Bl. 153, 155. See *Miller* v. *Horton*, 152 Mass. 540, 547. It has been held that a similar plea in the case of shipwrecked men at sea did not prevent the killing of one of them from being murder. *Queen* v. *Dudley*, 14 Q. B. D. 273. See *United States* v. *Holmes*, 1 Wall. Jr. 1. It is clear that a contract induced by such fear is voidable only, not void, and that the ground of avoidance being like fraud, that the party has been subjected to an improper motive for action, when that motive has been created by a stranger and is unknown to the party the contract stands. Keilwey, 154 a, pl. 3. *Fairbanks* v. *Snow*, 145 Mass. 153. So a conveyance induced by duress is operative until avoided and cannot be set aside when the property has passed to a purchaser without notice. *Bainbrigge* v. *Browne*, 18 Ch. D. 188, 197. 2 Williams, Vendor & Purch. 767. *Clark* v. *Pease*, 41 N. H. 414. The distinction is as old as the Roman law. *Tamen coactus volui.* D. 4. 2. 21 § 5. 1 Windscheid, Pandekten, § 80.

The same principles which apply to the making of a contract apply to the breach of it and to non-performance of the conditions attached to performance on the other side. The contract before us by construction provides that an abandonment of the voyage in consequence of the perils of the sea shall not be an actionable breach, but it equally provides that a completion of the voyage shall be an absolute condition to the right to freight. The same absoluteness attaches the further condition implied from the first that the effort to complete the voyage shall not be given up voluntarily, midway.

The argument urged to the effect that the cargo's liability to general average created a right to have the voyage finished, however it might have been otherwise, does not need an extended answer. The cargo-owners had the same right to treat the contract as ended as against a ship-owner who had cut down a mast that they would have had against one who had made no sacrifice for the common good. The contract is

the supreme source of mutual rights, and cannot be overridden by the incidents of its performance.

The case was brought here by the cargo-owners to get rid, if possible, of the personal liability imposed by the Circuit Court. As this Court is of opinion that the personal liability should not have been imposed, no other question needs consideration here.

Decree reversed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 12.—October Term, 1905.

The Eliza Lines. }

[October 30, 1905.]

Mr. Justice Brown, with whom were Mr. Justice Harlan, Mr. Justice McKenna and Mr. Justice Day, dissenting.

Underlying all the questions connected with the libel of Ward & Co. for the possession of the cargo, and that of Andreasen in the nature of of a cross libel against the cargo *in rem*, and against Ward & Co. *in personam* for freight, is the proposition that the abandonment of the vessel by the master and crew operated as a dissolution of the contract of affreightment and authorized Ward & Co. to reclaim possession of the cargo, either freed altogether from any claim for freight, or upon the payment of a *pro rata* freight to Boston.

The general principles applicable to a contract of affreightment are entirely well settled, but it may not be amiss to restate such of them as bear upon the effect of an abandonment at sea, and subsequent rescue of the vessel. The contract is an entire one, and cannot be apportioned, unless by consent of the parties. (*The Nathaniel Hooper*, 3 Sumner, 542, 554; *Hunter* v. *Prinsep*, 10 East. 378, 394; *Post* v. *Robertson*, 1 Johns. 23, 26.) From the moment the cargo is delivered to the vessel, each is bound to the other for the performance of the contract. The shipper cannot recover his cargo except upon the payment of full freight. (*Tindall* v. *Taylor*, 4 Ellis & Bl. 219.) Neither can the vessel demand any portion of the freight until the cargo is delivered at the port of destination. If the vessel meet with disaster at sea and put into a port of refuge, she is entitled to retain the cargo for a reasonable time for repairs, or to tranship it to another vessel, in order that her freight may be earned. (*The Soblomsten*, L. R. 1 Ad. & Ec. 293; 1 Pars. on Ship. 175, 231; *Cargo* v. *Galam*, B. & L. 167, 178.) If, however, the master of the vessel is willing to surrender the cargo at an intermediate port, and the shipper is willing to receive it, he may do so upon payment of a *pro rata* freight. In other words, the parties may substitute a new contract for the original one. Neither party, however, can be compelled to this course. (*Post* v. *Robertson*, 1 Johns. 23, 27.)

If it be once granted that, in case of shipwreck or other disaster, the contract of affreightment is not dissolved, and the authorities on this question, both in this country and in England, settle this beyond controversy, (*Cargo* v. *Galam*, B. & L. 167; *Shipton* v. *Thornton*, 9 Ad. & Ellis, 314, 355,) it is difficult to see why, on principle, a compulsory abandonment at sea should work a different result, provided the vessel be ultimately rescued and taken into port. The abandonment is but a feature of the disaster, and is no abandonment at all of the ship and cargo in the sense in which that word is used in the law of marine insurance, where a vessel after such disaster is abandoned to the underwriters. (*Thornley* v. *Hebson*, 2 B. & Ald. 513, 519.) In such case the abandonment is a voluntary and complete surrender of the ship and cargo, and of all right, title and interest thereto, and the underwriter becomes the owner with all the rights and liabilities incident to such ownership. It is true it has been held that the underwriter may decline to accept such abandonment and may repair the vessel and return it to the owner, but that does not change the character of the abandonment.

The same may be said of the throwing overboard of portions of a cargo of perishable articles, on account of rottenness, putrescence or threatened danger to the rest of the cargo. But the case under consideration is more nearly analogous to the jettison of valuable cargo for the purpose of relieving the ship or preventing her from drifting ashore. This has never been supposed to work any change in the ownership or an abandonment of the property, although it may subject it to the claim of salvors, who may subsequently rescue it. (*The Kathleen*, L. R. 4 Ad. & Ec. 269, 278.) The abandonment of the ship and cargo in this case did not operate as a transfer of the property to any one who should rescue it, but was an involuntary abandonment of the voyage, a relinquishment of any present intention to continue it, and a flight from the vessel to save the lives of the crew, and for the purpose of obtaining a supply of fresh water. If the abandonment have the effect claimed for it, of dissolving the contract of affreightment, logically it would have that effect from the moment the master and crew were transferred to the schooner which took them off; but it will not be doubted that, if within an hour, a steam tug had hove in sight and offered to take the abandoned vessel in tow, the rights of the master and owner would have remained unimpaired, except for the claim for salvage. In our view it would make no difference whether the master had hired a steam tug to tow her to a place of safety, or whether, after the master and crew had left her, a vessel had come along, picked her up and towed or navigated her to a harbor of refuge. Granting that the master and crew left her with no intention of returning, such intention was caused by the belief on his part that she was a total loss. But if the circum-

stances were so changed that she did not become such, we see no reason why he was not entitled to change his mind in that particular, provided that he acted with sufficient promptness, and intervening rights had not accrued.

The facts of this case show that as soon as the master learned of the rescue of the vessel he went to Boston, arriving September 21, two days after the barque, went aboard the vessel, announced his intention of completing the voyage, and, the day after the libel for salvage was filed, interposed a claim for ship and cargo, in which he alleged that he was entitled to the possession of the cargo of hard pine lumber then on board of her, having given bills of lading for it, and being obliged by the terms of such bills of lading to deliver said cargo at Montevideo in the province of Uraguay. There was manifestly no lack of diligence here, although the agents of Ward & Co. filed a claim to the cargo later on the same day, and on October 18 filed a libel for possession and moved for a sale of the cargo. The question was thus squarely presented as to which of these parties was entitled to the cargo, which was manifestly dependent upon the other question, whether the contract of affreightment was still in existence. That there was no definite intention of abandoning the lien of the ship upon the cargo is shown by the fact that as soon as the master was informed that the vessel had been rescued he took immediate steps to recover possession of the cargo.

The American cases upon the effect of abandonment of a vessel at sea upon the contract of affreightment are not of any great value, as the subject is not fully discussed in any of them and the question was not presented in the aspect in which it is before us in this case. In *The Elizabeth and Jane,* (1 Ware, 41,) the petition was for wages, which were denied upon the ground that the vessel had been abandoned and no freight had been earned. The case of *The Nathaniel Hooper,* (3 Sumner, 542,) is still more indefinite in its treatment of the subject herein involved. So, in the case of *Dunnett* v. *Tomhagen,* (3 Johnson, 154,) wages were denied to the seamen, because no freight was earned on the homeward voyage, no part of the cargo being delivered by the ship.

In *Post* v. *Robertson,* (1 Johns. 24,) the vessel was abandoned after performing three-fourths of her homeward voyage, was rescued by salvors and brought into port, where the cargo was sold, and the proceeds paid to the salvors and owners. It was held that this was not such a delivery of the cargo as would entitle the ship owners to maintain an action on the charter party for full freight. The case turned largely upon the form of action, covenant, and the Court was inclined to the opinion that an action might have lain for a *quantum meruit.*

In none of these cases was the question discussed as to the power of the master to reclaim possession of the cargo at the port of refuge in order to

earn his freight, it being seemingly assumed that the wreck and abandonment of the vessel had dissolved all contracts, and especially that of the seamen, who attempted to enforce their lien upon the cargo before freight had been earned by its delivery at the port of destination.

It may be frankly admitted that the English cases lay down the rule that the abandonment of the vessel puts an end to the contract of affreightment, or at least it gives the owner of the cargo an option to do so. The case of *The Kathleen*, (L. R. 4 Ad. & Ec. 269,) is the earliest upon the subject, and asserts a principle which has been followed in the subsequent English cases. The Kathleen had left Charleston with a cargo of cotton bound for Bremen, and when in the English Channel suffered a collision with another vessel, for which the Kathleen was in nowise to blame. On the following day she was abandoned by her crew and rescued by salvors, taken to Dover and sued for salvage. The owner of the Kathleen applied for leave to bond the cargo in the salvage suits in order that they might carry the same to its destination. The court ordered the cargo sold on the ground that it was deteriorating fast through the damage sustained by salt water. A suit for freight was subsequently instituted by the owners of the vessel. Sir Robert Phillimore held that the original contract between the owners of the ship and cargo was at an end, and that no freight was due, and in answer to the claim of *pro rata* freight observed that the title to such *pro rata* freight must arise out of a new contract with the ship owner, to which both parties assent, and as neither party assented, *pro rata* freight was not due. In view of the fact that at least seven-eighths of the voyage had been performed; that the collision which put an end to the voyage was not in anywise the fault of the Kathleen; that she was taken into a port in the immediate neighborhood, and that the vessel stood ready to take the cargo on to Bremen and earn her freight, we are not favorably impressed with the natural justice of a decision which denied even *pro rata* freight to the master.

The case of *The Cito*, (7 P. D. 5,) was much like that of the Kathleen, which was followed by the Court of Appeals in an opinion by Lord Justice Brett, subsequently Lord Esher. The Cito, on a voyage from Wilmington to Rottendam, with a cargo of resin in barrels, was, owing to the peril of the sea, abandoned by her crew off the American coast. She was subsequently picked up and navigated to Plymouth, and there arrested for salvage. The Court declined to hold that a mere abandonment at sea put an end to a contract of affreightment, since the abandonment might be wrongful, and in such a case the owner of the cargo might sue the ship upon its contract; but it held that the abandonment was so far binding upon the ship owner as to allow the cargo owner to treat such contract as abandoned. The Court also held that the Court below was right in order-

ing the cargo to be delivered to the owners upon their giving bail for salvage. Some stress was laid upon the fact that before the shipowners sought the possession of the cargo, the cargo owners had intervened and applied for it.

In the case of *The Leptir*, (5 Asp. M. L. C. 411,) the salving vessel took off the crew of the vessel in distress, refused to allow her own crew to return, and the two vessels were navigated into a port of refuge. It was held that there was no abandonment, that the case of the Cito did not apply, and the Court decreed for a *pro rata* freight.

In *The Argonaut*, unreported, but published in the Shipping Gazette of December 5, 1884, a vessel on a voyage from Halifax to Liverpool was abandoned by her crew and picked up by salvors off the English coast. On being taken to Plymouth the owners demanded the cargo, but the Court ordered it carried to Liverpool, where it obtained a higher price than the owner could have gotten for it at Plymouth. It seems to have been carried in the ship by her own crew from Plymouth to Liverpool. The Admiralty Court allowed a *quantum meruit* freight, but its decree was reversed by the Court of Appeals, which held that the ship was entitled to nothing.

The prior cases were, however, pushed to their logical conclusion in that of *The Arno*, decided by the Court of Appeals, (8 Asp. M. L. C. 5.) The vessel, while on a voyage from New York to Liverpool, was, owing to stress of weather, abandoned at sea on March 31, and three days thereafter was picked up by a salvage crew, and taken to Liverpool, her port of destination. The Admiralty Court held that, although the cargo was delivered by the vessel on which it had been originally shipped, at the port of destination, the act of abandoning her so clearly indicated the intention of the master not to carry out the contract, as to entitle the owners of the cargo to treat that act as putting an end to it. It was held that no freight was recoverable. It appeared that on April 11, as soon as the owner of the Arno heard of the abandonment, he made an arrangement with the salvors, sent a tug to meet the vessel, which returned with her to Liverpool on April 25. It was intimated that if, before notice to the ship owner of the election of the cargo owner to treat the contract as at an end, he had been able to resume possession of the ship and cargo, he might perhaps have been able to annul the abandonment, but not having done so, the cargo owner had a right to treat the abandonment as a dissolution of the contract. The judgment was affirmed by the Court of Appeals. It is true that in this case the cargo was not delivered at the port of destination by the crew of the ship, but by the salvor's crew. It was, however, delivered by the ship herself, and we see no reason why the salvor's crew might

not have been treated as the agent of the ship in that particular; but the Court held to the hard and fast rule of the Cito, that the abandonment of a ship *ipso facto* put an end to the contract of affreightment, notwithstanding the fact that the cargo was delivered by the same ship and at the port of destination. Under such circumstances the denial of all freight seems to have worked a great hardship.

Although the House of Lords has not yet spoken upon the subject, these cases must be regarded as settling the English rule that a compulsory abandonment of a vessel at sea puts an end to the contract of affreightment and disentitles her owners to recover any portion of her freight, notwithstanding that she and her cargo may be picked up by salvors and taken into an intermediate port, or even to the port of discharge.

That the soundness of this doctrine has not been accepted without challenge is evident, not only from certain expressions by some of the English writers, but notably by Dr. Wendt, in his work on Maritime Legislation, wherein he speaks of the Cito as having caused much surprise among those interested in maritime commerce, and comments upon it as follows (3d edition, page 629):

"So long as this Cito decision stands it gives the cargo owner the full option to take advantage of the common misfortune for the purpose of evading the contract entered into by him. This, I confidently assert, is opposed to every principle of law and justice. A contract, by the law of every civilized country, holds good until both parties to it, of their own free will, agree that it shall not be carried out. Now, how can the abandonment of a ship in such a case as the Cito be taken to be an expression of an agreement on the part of the owners of the vessel to cancel the contract? The action of the crew in leaving a vessel to save their lives is not an act of will at all; they have to desert their vessel under the pressure of a *vis major*. How can this be taken to show an agreement on the part of the ship owner to abandon his part of the contract? He has no power to exercise any option at all. If, when the vessel is recovered and the owner again requires [acquires?] the power to exercise his will in the matter, he then elects not to carry out his contract, and the cargo owner agrees, well and good; the contract is put an end to by mutual consent. To assume, however, such consent on the part of one of the contracting parties from an action forced on his servants by a power which cannot be resisted seems to me to be a doctrine utterly opposed to common sense."

The ruling of the English courts that even a delivery of the cargo at the port of destination does not entitle the ship owners to any freight whatever, seems a somewhat startling innovation upon the ancient rule of the Admiralty, that a loss occasioned by a peril of the sea shall be borne as a common burden and shared proportionately by the ship, cargo and freight, as well as a departure from the general rule that neither party can put an end to a contract without the assent of the other.

We consider the sounder doctrine to be that the compulsory abandonment of a ship at sea should be treated merely as a relinquishment of the voyage and of any present intention to continue it, but that if the vessel be subsequently rescued and taken into an intermediate port, the master retains the same right given to him by an ordinary disaster at sea, unat tended by an abandonment, to resume possession of the ship and cargo, subject, of course, to the claim of salvors, and carry the latter forward to its destination, provided he act with promptness and before any intervening rights had accrued.

The opinion of the Court assumes that the abandonment of the vessel was a repudiation and a rescission of the contract of affreightment, when in fact it was involuntary, designed only to save the lives of the crew, and had as little effect upon the contract as if the vessel had met with a disaster not involving an abandonment and put into a port of safety for repairs. It apparently ignores the principle that, to constitute a rescission, there must be the same intent to rescind as there was originally to contract, and that the intent to rescind should not be inferred without some act which points unmistakably to that conclusion. There is no more reason for holding that the abandonment of the ship was a rescission of the contract of affreightment than that such abandonment was a renunciation of all the owner's title to the ship in case she were subsequently rescued. Whether, if Ward & Company had insisted upon the ship carrying out her contract they might, in case of refusal, have had a cause of action, it is unnecessary to consider. In view of the severity of the storm, and of the danger of remaining on board, the effect of her abandonment on the contract probably never entered the mind of the master. Such abandonment was not a failure to perform the contract in any particular, since it was the result of an overwhelming necessity, and if the vessel were rescued the master might repair and continue the voyage, or transship the cargo to another vessel after the extent of the damage had been ascertained. He might indeed have supposed that the ship was irretrievably lost, but both parties took the chance of of its being rescued and taken to a port of safety, when the question would then arise whether prudence required her to be repaired, or the cargo transshipped.

In such case the same question arises as if the ship had met with a disaster, and been navigated into a port by her own crew. We think it makes no difference in principle whether a tug is hired by the master to take his ship into port, or a tug in the employment of auother person comes along and picks her up. If the cargo-owner had himself rescued the vessel he might doubtless have declared the contract rescinded, but it is quite otherwise if the vessel be rescued by her own master and crew, or be taken in tow by a third party.

Applying the doctrine of the opinion, it would follow (and such are the English cases of the Kathleen and the Arno) that if the vessel be abandoned near her port of destination and towed into such port by a salving tug, she loses her whole freight and cannot even recover on a *quantum meruit*, though the whole voyage be performed.

This conclusion seems so irreconcilable with natural justice that we are constrained to dissent.

True copy.

Test:

Clerk Supreme Court, U. S.